

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 845. 218.

ROBERT DUNLAP, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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FILED DECEMBER 22, 1897.

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(16,760.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 547.

ROBERT DUNLAP, APPELLANT,

*vs.*

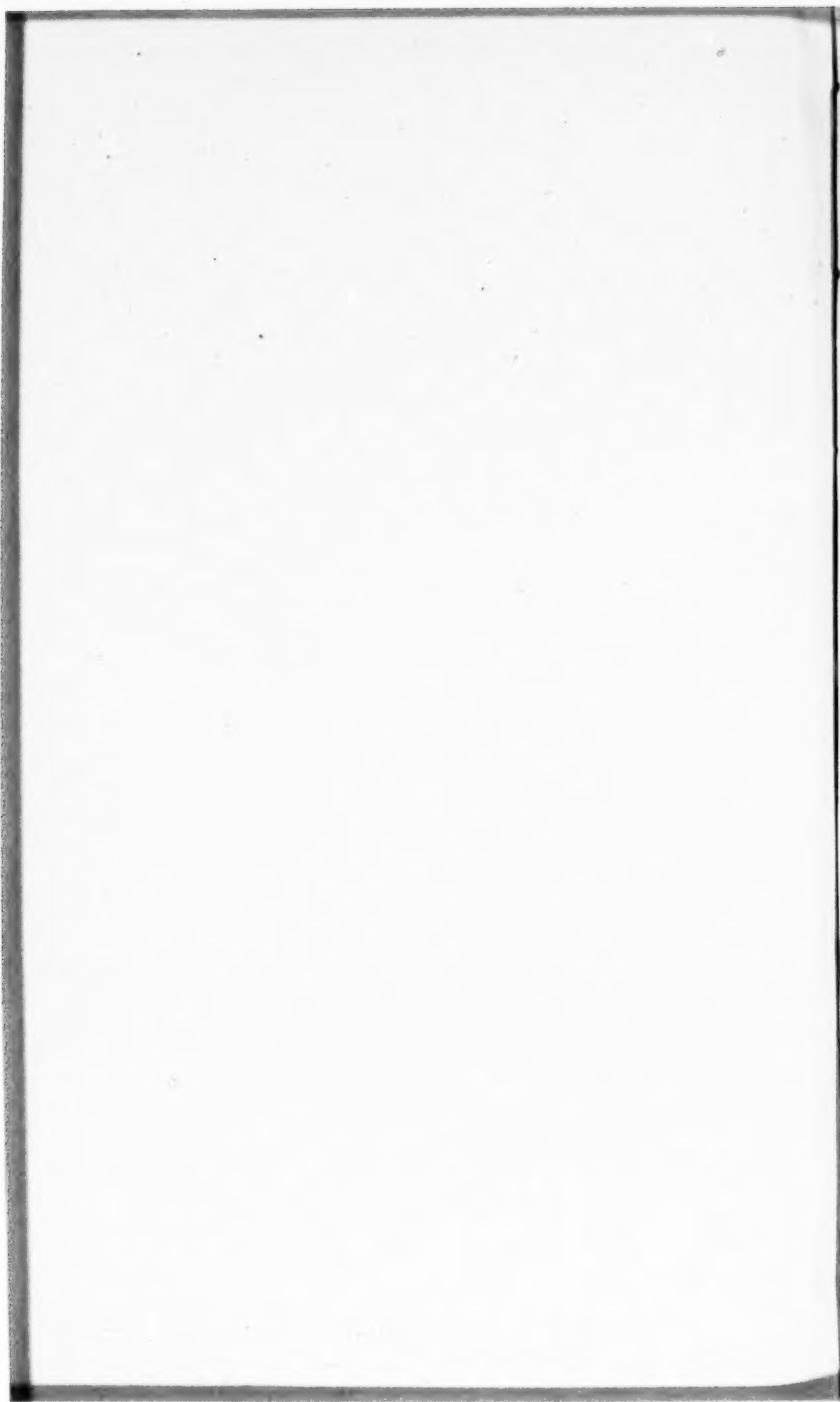
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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## In the Court of Claims.

ROBERT DUNLAP, Doing Business under the Firm Name and Style of R. Dunlap and Company,	} No. 18778.
v.	
THE UNITED STATES.	

I. Petition filed January 17, 1895.

II. Amended petition filed by leave of court April 10, 1895.

III. Second amended petition filed by leave of court April 20, 1895, which is as follows:

To the honorable the Court of Claims:

The claimant, Robert Dunlap, respectfully represents:

1. The claimant is and has been for one year last past, and long prior thereto, doing business under the firm name and style of R. Dunlap & Co., and having his factory at Nostrand and Park avenues in the city of Brooklyn, in the State of New York, and his office and principal place of business at number 178 Fifth avenue, in the city of New York and State of New York, and engaged in the manufacture of a product of the arts known and described as "stiff hats."

2. On the 28th day of August, in the year 1894, Congress passed an act entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," by the sixty-first section of which it was enacted as follows:

2 "Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

3. Thereafter, to wit, on the 6th day of October, in the year 1894, the Secretary of the Treasury made a decision in regard to the execution of said section, and officially notified the Commissioner of Internal Revenue thereof, as follows:

"Hon. J. S. Miller, Commissioner of Internal Revenue.

"SIR: Your communication of yesterday in reference to the execution of section 61 of the act of August 28th, 1894, and advising me that, for the reasons therein stated, 'you are unable to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress,' is received. I have also given much attention to the subject, and have fully considered all the arguments and suggestions submitted by the parties interested in the execution of the section of the statute referred to,

and have arrived at the conclusion that, until further action is taken by Congress it is not possible to establish and enforce such regulations as are absolutely necessary for an effective and beneficial execution of the law.

"You are therefore instructed to take no further action in the matter for the present.

"Respectfully,

J. G. CARLISLE, *Secretary.*"

3 Under and in consequence of said decision no regulations have been prescribed by the Secretary of the Treasury as required by said sixty-first section, and none of the collectors of internal revenue have taken any steps to satisfy themselves in regard to the alcohol having been used by these claimants or any other manufacturers, as required by said section.

4. Between the 28th day of August, in the year 1894, and the 16th day of March, in the year 1895, the claimant found it necessary to use, and actually and necessarily did use in the manufacture of "dissolved shellac," the product or ingredient used to stiffen the hereinbefore — "stiff hats," seven thousand and sixty and ninety-five hundredths (7,060.95) proof gallons of alcohol, upon which a tax had been paid to the United States at the rate of ninety (90) cents a proof gallon on two thousand six hundred and four (2,604) proof gallons, and one dollar and ten cents (\$1.10) a proof gallon on four thousand four hundred and fifty-five and one-tenth (4,455.1) proof gallons.

On or about the 17th day of October, 1894, the claimant gave the collector of internal revenue for the district in which the claimant's business is carried on, notice that he was using alcohol in the manufacture of the aforesaid products of the arts, and requested him in said notice to take such official action relative to inspection and surveillance as the law and regulations might require.

Thereafter, on or about the 12th day of January and the 22d day of March, in the year 1895, the claimant tendered to said collector affidavits and testimony, showing that he had used the quantity of alcohol hereinbefore set forth in the manufacture of "dissolved shellac," the product or ingredient used to stiffen the herein-

4 before-described "stiff hats," and not otherwise, and exhibited to said collector the stamps showing that a tax had been paid to the United States thereon as aforesaid, and then and there offered to deliver up to said collector said stamps to the end that the claimant might receive from the Treasury of the United States a rebate or repayment of the tax so paid.

But said collector, acting under the decision of the Secretary of the Treasury as hereinbefore set forth, and under instructions from said Secretary in accordance therewith, then and there declined, on the date hereinbefore specified, to receive such stamps, or such affidavits, or testimony, or any of them, or to take any steps whatever under said sixty-first section of said act of August 28, 1894.

The claimant is advised, however, that neither the failure of said Secretary of the Treasury to prescribe regulations as prescribed by said act of August 28, 1894, nor the failure of said collector of in-

ternal revenue to receive said affidavits, or testimony, or said stamps, constitutes any bar to recovering in this court from the Treasury of the United States the amount of rebate or repayment of tax as provided by law.

5. The claimant is ready and willing, and hereby offers to exhibit and deliver up to any officer of the United States, or to deposit as this honorable court may decide and direct, the stamps showing that the tax has been paid on said alcohol as aforesaid.

No other action than as aforesaid has been had on this claim in Congress, or by any of the departments.

The claimant is the sole owner of this claim, and the only person interested therein, and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets.

The claimant is a citizen of the United States, and he believes the facts as stated in this petition to be true.

And the claimant asks judgment for seven thousand two hundred and forty-four dollars and twenty-one cents (\$7,244.21), besides costs.

GEORGE A. KING, *Attorney of Record.*

CHARLES & WILLIAM B. KING, *Counsel.*

STATE OF NEW YORK, }  
City and County of New York, } ss:

Robert Dunlap, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true to the best of my knowledge and belief.

ROBT DUNLAP.

Subscribed and sworn to before me this 20th day of April, 1895.

RALPH T. KEYSER,

[SEAL.]

*Notary Public.*

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IV.—*Traverse.* Filed June 7, 1897.

And now comes the Attorney General, on behalf of the United States, and answering the second amended petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the said amended petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

L. A. PRADT,

*Assistant Attorney General.*

7 V.—*Findings of Fact and Conclusion of Law.* Filed December 6, 1897.

This case having been heard by the court, the facts are found as follows:

## I.

The claimant, Robert Dunlap, has been from a time long prior to the 28th day of August, 1894, and still is, engaged in business as a manufacturer of hats, under the name and style of R. Dunlap & Co., having his factory at the corner of Nostrand and Park avenues, in the city of Brooklyn, in the State of New York.

## II.

The claimant in the usual and ordinary course of his business found it necessary to use alcohol in the process of manufacture of stiff hats, in the following manner:

The alcohol is first mixed with other chemical ingredients, and shellac is then dissolved therein. The product thus obtained is then applied with a brush to the body of the hat, and both rolled and brushed in. The hat bodies are then laid away on shelves to dry. The purpose of dissolving the shellac is to render it semi-liquid in order to enable it to be forced into the pores of the felt, the use of the alcohol being as an agent to convey the shellac into the hat bodies. No alcohol remains in the finally dried body, all of it disappearing by evaporation.

The alcohol, after being mixed with the shellac as aforesaid, can only be separated by an expensive and difficult process, and can be distinguished from alcohol which has not been mixed with shellac.

The use of alcohol or some other solvent is necessary in order to stiffen the bodies of stiff hats, but, on account of the high tax on ethyl alcohol, other solvents are used for that purpose by all manufacturers of stiff hats in the United States, except a very few, who, like the claimant, manufacture hats of the highest and most expensive grades exclusively. Wood alcohol is the most efficient and also the most expensive of these substitutes. The fumes of wood alcohol irritate the eyes of the workmen, causing conjunctivitis. Workmen have sometimes been obliged to give up their work on account of its use, as it has a tendency to injure the eyes permanently.

These conditions are not so aggravated from the use of the most refined grades of wood alcohol as of the less refined and  
8 cheaper grades, and recent improvements in refining have lessened the injurious effects formerly arising from its use. But for the tax on grain alcohol it would be cheaper than any grade of wood alcohol. The cost of a gallon of ordinary refined wood alcohol (95°) is about 70 cents; of the highest grade of wood alcohol, \$1.50; of grain alcohol (95°) untaxed, 23 cents, and of grain alcohol taxed, \$2.30.

## III.

Between the 28th day of August, in the year 1894, and the 24th day of April, in the year 1895, the claimant found it necessary to use, and did use, in the manufacture of dissolved shellac, in the manner hereinbefore set forth, 2,604.17 proof gallons of domestic alcohol, upon which internal-revenue tax had been paid to the United States at the rate of 90 cents a proof gallon, amounting to \$2,344.40, and 4,456.78 proof gallons of domestic alcohol, upon which an internal-revenue tax had been paid to the United States at the rate of \$1.10 a proof gallon, amounting to \$4,900.81, the total internal-revenue tax paid on said alcohol being \$7,244.

## IV.

*Notice of Use of Alcohol.*

On the 17th day of October, 1894, the claimant gave the following notice to the collector of internal revenue for the district in which his business is carried on :

A. Augustus Healey, collector of internal revenue, first district, New York.

SIR: We hereby notify you that we are using in the manufacture of hats at our factory, corner Nostrand and Park avenues, this city, domestic alcohol, on which we claim, under section 61 of the new tariff bill, a rebate of the internal revenue tax paid, and we respectfully request that you take such official action relative to inspection and surveillance as the law and regulations may require.

Very respectfully,

R. DUNLAP & CO.

## V.

*Exhibition and Delivery of Stamps, etc.*

The claimant, on several occasions, tendered to said collector affidavits and other evidence tending to show that he had used alcohol in the manner and quantity set forth in findings II and III, and exhibited and offered to deliver up to said collector the stamps showing that the tax had been paid thereon, together with notices in the following form :

BROOKLYN, N. Y., — — —, 189—.

Hon. collector of internal revenue, Brooklyn, N. Y.

SIR: In accordance with the requirements of section 61 of the existing tariff act, we herewith exhibit, offer, and deliver up to you the — stamps described in the annexed memorandum, which serve to show, and do show, that the tax was paid on certain distilled spirits or alcohol, purchased at various times from the distillers' agent as per the invoices now on file in our office.

We further request and ask that you proceed to our factory at Nostrand and Park avenues, Brooklyn, N. Y., and there satisfy yourself by an examination of our stock books, records, sales books, and other documents (or in any other manner, which in your judg-

ment the law may require), that we have used said alcohol or distilled spirits in the manufacture of shellac stiffening, a product of the arts, since the enactment of said law.

We furthermore request that you pay, remit, or rebate to us \$—, the full amount of the tax paid on said alcohol, or distilled spirits, to which we are entitled by the provisions of said law.

Very respectfully,

R. DUNLAP & CO.

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VI.

Attached to said notices were lists of the accompanying stamps.

Said collector, acting under instructions of the Secretary of the Treasury, declined to receive said stamps, affidavits, or other evidence, but received the notices and the lists attached thereto.

Under the act of May 28 (21 St. L., 145) the internal-revenue regulations require all packages of distilled spirits upon which the tax has been paid to have the following identifying marks and stamps:

A. On removal from receiving cistern to distillery warehouse:

Cut on the bung stave—

Gross weight, tare, and net weight.

Number of wine gallons.

Proof.

Number of proof gallons.

On head of package—

Serial number of package.

Serial number of warehouse stamp.

Date of inspection.

Trade name of spirits.

Warehouse stamp, showing—

Serial number.

Serial number of package.

Number of proof gallons.

Distiller's name.

Date of warehousing.

Cancellation of stamp, showing gauger's name and district above and below stamp.

B. On removal from distillery warehouse and payment of tax:

Cut or branded on each package—

Distillery number.

Name of distiller and of district.

Date of payment of tax.

Number of proof gallons.

Serial number of tax-paid stamp.

Tax-paid stamp (so placed on the head of the package as to cover no portion of any brand or mark already placed thereon), showing—

Serial number of stamp.

Warehouse, district, and State.

Date of payment of tax.

Number of proof gallons.



Serial number of package.

Name of consignee.

Cancellation of stamp, showing gauger's name and district above and below stamp.

(Internal Revenue Regulations, series 7, No. 7, revised, pp. 138-145.)

VII.

Between August 28, 1894, and the next session of Congress the following official action was taken in regard to section 61 of the act of August 28, 1894:

In the early part of September, 1894, the Secretary of the Treasury requested the Commissioner of Internal Revenue to have regulations drafted for the use of alcohol in the arts, etc., and for the presentation of claims for rebate of the tax. Subsequently there was correspondence between these officers as follows:

WASHINGTON, D. C., October 3, 1894.

Hon. John G. Carlisle, Secretary of the Treasury.

SIR: I have the honor to report that the preparation of regulations governing the use of alcohol in the arts and manufactures, with rebate of the internal-revenue tax as provided by section 61 of the revenue act of August 28, 1894, has been and is now receiving very serious consideration from this office, and many communications have been received from, and personal interviews had with, manufacturers who use alcohol in their establishments; and it is found, in every case without exception, all agree that no regulation can be enforced without official supervision, and that without such supervision the interests of manufacturers and of the Government alike will suffer through the perpetration of frauds.

As it is found to be impossible to prepare these regulations in a way that will prove satisfactory without official supervision, I have the honor to inquire whether there is any appropriation or any general provision of law authorizing the expenditure of money by this department needed to procure such supervision.

Respectfully yours,

JOS. S. MILLER,

Commissioner.

WASHINGTON, D. C., October 5, 1894.

The Commissioner of Internal Revenue, Treasury Department.

SIR: Yours of the 3d instant, inquiring whether there is any appropriation or general provision of law authorizing the expenditure of money by the Treasury Department or by the Commissioner of the Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, is received, and in response I have the honor to state that no appropriation whatever, either special or general, has been made by Congress for the purpose mentioned, or for any other purpose connected with the execution of the section of the statute referred to.

Very respectfully yours,

J. G. CARLISLE, Secretary.

WASHINGTON, D. C., *October 5, 1894.*

Hon. John G. Carlisle, Secretary of the Treasury, Washington,  
D. C.

SIR: I have the honor to acknowledge the receipt of your letter of the 5th instant, in reply to my letter of the 3d instant, in which you state that no appropriation whatever, either special or general, has been made by Congress authorizing the expenditure of money by the Treasury Department or by the Commissioner of Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, or for any purpose connected with the execution of the section of the statute referred to.

In reply I would suggest that, inasmuch as I have been unable, as stated in my letter of the 3d instant, after thorough consideration of the matter, and upon consultation by letter and by personal interview with a large number of the most prominent manufacturers, to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress, the preparation of these regulations be delayed until Congress has opportunity to supply this omission.

Respectfully yours,

JOS. S. MILLER,  
*Commissioner.*

WASHINGTON, D. C., *October 6, 1894.*

Hon. J. S. Miller, Commissioner of Internal Revenue.

SIR: Your communication of yesterday, in reference to the execution of section 61 of the act of August 28, 1894, and advising me that, for the reasons therein stated, you are unable "to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress," is received. I have also given much attention to the subject, and have fully considered all the arguments and suggestions submitted by parties interested in the execution of the section of the statute referred to, and have arrived at the conclusion that, until further action is taken by Congress, it is not possible to establish and enforce such regulations as are absolutely necessary for an effective and beneficial execution of the law.

You are, therefore, instructed to take no further action in the matter for the present.

Respectfully,

J. G. CARLISLE, *Secretary.*

11 In consequence of this last letter the following circular was issued:

*Circular Relative to Applications for Rebate under Section 61 of the Act of August 28, 1894.*

WASHINGTON, D. C., November 24, 1894.

In view of the fact that this department has been unable to formulate effective regulations for carrying out the provisions of section 61 of the act of August 28, 1894, relating to the rebate of tax on alcohol used in the "arts, or in any medicinal or other like compounds," collectors of internal revenue will, on receiving notice from manufacturers of the intended use of alcohol for the purposes named, advise such manufacturers that, in the absence of regulations on the subject, no official inspection of the alcohol so used or the articles manufactured therefrom can be made, and that no application for such rebate can be allowed or entertained.

JOS. S. MILLER,  
*Commissioner.*

VIII.

On December 3, 1894, the Secretary of the Treasury transmitted to the Congress the annual report on the finances, containing the following statement:

Owing to defects in the legislation, the Treasury Department has been unable to execute the provisions of section 61 of the act of August 28, 1894, permitting the use of alcohol in the arts, or in any medicinal or other like compound, without the payment of the internal tax. The act made no appropriation to defray the expenses of its administration, or for the repayment of taxes provided for; and, after full consideration of the subject and an unsuccessful attempt to frame regulations which would, without official supervision, protect the Government and the manufacturers, the department was constrained to abandon the effort and await the further action of Congress.

It is estimated in the office of the Commissioner of Internal Revenue that the drawbacks or repayments provided for in the act will amount to not less than \$10,000,000 per annum, and that the expenses of the necessary official supervision will not be less than \$500,000 per annum. For the information of Congress, the correspondence between the Secretary and the Commissioner of Internal Revenue upon this subject will accompany this report. (Finance Report, 1894, LXVI.)

Appended to this report was a draft of regulations proposed for carrying out section 61, copies of communications from the Commissioner of Internal Revenue explaining the estimates of the appropriations required, and copies of the official correspondence between the Secretary and the Commissioner, given in the preceding finding, showing the action of the department. The proposed regulations were as follows:

On the 28th of November, 1894, the Commissioner of Internal Revenue, at the request of the Secretary of the Treasury, submitted to him a draft of proposed regulations, to wit:

- 12     *Regulations for the Allowance of Rebate of Internal-revenue Tax on Alcohol Used in the Arts and in the Manufacture of Medicinal or Other Like Compounds.*

TREASURY DEPARTMENT,  
WASHINGTON, D. C., — — —, 1894.

Section 61 of the act of Congress of August 28, 1894, entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," provides :

• "Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

*Definitions.*

Article 1. The word "*manufacturer*" as employed in the statute above quoted is held to mean any person who, having an established place of business, manufactures, *for wholesale only*, articles in which alcohol is either a necessary constituent or is necessarily used in the process of manufacturing such articles, *except* spirituous liquors or other alcoholic compounds, intended or used as a beverage.

Under this construction rectifiers, compounders, or other persons manufacturing any of the articles last referred to will not be regarded as *manufacturers* within the contemplation of the statute named.

Article 2. The word "*alcohol*" is held to be distilled spirits of an alcoholic strength of not less than one hundred and eighty-eight per centum of proof spirits, as defined by section 3249 of the Revised Statutes of the United States; and which have been branded and deposited in the distillery warehouse as *alcohol*.

Article 3. The word "*arts*," as above used, is held to apply only to the manufacture of articles (other than spirituous liquors) where the process of manufacture requires the use of alcohol, and where the alcohol used is either a component part of the manufactured article or is necessarily destroyed or lost in the process of such manufacture. Under the construction here given no rebate of tax will be allowed where the alcohol used, and not remaining incorporated with the manufactured article, is recoverable by distillation, filtration, or by any other process. Also where its use is not necessarily a part of the process of manufacture; as, for instance, when used for heating, drying, or other like purposes.

Nor will such rebate be allowed on alcohol used in laboratories

(except as herein provided) or in any experimental work whatever.

Article 4. The words "*medicinal or other like compounds*" are held to be articles, preparations, or compounds prepared according to the directions of the United States or other national pharmacopœia, or according to published formulas in common use among physicians or apothecaries in the United States; also medicinal preparations prepared according to private formulas when advertised, sold, and used solely as specifics or remedies for certain diseases or bodily ailments defined and treated in standard medical works of this country.

Under this construction no rebate of tax will be allowed on alcohol used in the manufacture of proprietary articles, wines, cordials, bitters, or other alcoholic compounds which are sold or used as a beverage or as a substitute therefor, or which, in the opinion of the Commissioner of Internal Revenue, are intended to be or may be so sold or used.

*Manufacturers to File Notice and to Give Bond.*

Article 5. Where rebate is to be claimed under the foregoing provision of law on alcohol used in the manufacture of articles, the manufacturer will, before obtaining the alcohol, file with the collector of internal revenue of the district in which the manufactory is situated a notice in duplicate in the following form :

(Form —.)

(Alcohol to be used for manufacturing purposes.)

Notice is hereby given that we — —, under the name and style of — —, are engaged (or intend to engage) in the business of manufacturing at the place herein designated the following-named articles, and that application will hereafter be made under the act of Congress of August 28, 1894, for rebate of the internal-revenue tax paid on the alcohol used in the manufacture of said article.

1. Location of premises.
2. Name and residence of owner of premises.
3. Name and residence of every person interested in the business to be carried on at said premises.
4. Description of all buildings on said premises, and purpose for which each is to be used.
5. Number and kind of stills, and capacity of each.
6. Number and kind of condensers.
7. Particular description of building or room to be used exclusively for the storage of alcohol.
8. Amount of capital now invested in the business carried on at said premises.
9. Number of persons employed on said premises.
10. Distance of premises to nearest rectifying house, or premises of a wholesale or retail liquor dealer.
11. Whether either of the above-named parties have been, or are

now, or intend to be during the ensuing year, interested in the business of manufacturing, rectifying, compounding, or selling alcoholic liquors, or compounds which may be used as a beverage.

12. Whether any of the articles below enumerated, or any articles heretofore manufactured by the parties, or either of them, were sold by them, or either of them, to any rectifier, wholesale liquor dealer, or retail liquor dealer during the year preceding the filing of this notice.

14 13. Description and estimated quantity of articles to be manufactured on said premises during the ensuing year ending June 30:

Articles.		Alcohol at 185° proof.			
Name of each.	Quantity of each.	Quantity to be used.	Quantity to be recovered.	Loss by free evaporation.	To remain incorporated in article.
		<i>Proof galls.</i>	<i>Per cent.</i>	<i>Per cent.</i>	<i>Per cent.</i>

14. List of articles to be manufactured on premises, as to which no alcohol will be used in the manufacture thereof.

15. Estimated quantity of alcohol required for a period of three months, — proof gallons.

16. Estimated quantity to be used each day manufactory is operated.

17. Quantity of alcohol used at said manufactory during the year last preceding the filing of this notice, — proof gallons.

18. Formula by which each article above named is to be manufactured, except drugs and other medicinal preparations, prepared according to published formulas, —.

STATE OF —, }  
County of —. }

Personally appeared the above-named, — —, who, being first duly sworn, depose- and say- that the statements contained in the foregoing notice are true; that the alcohol on which a rebate of internal-revenue tax is to be claimed will be used solely for the purposes and in the manner above stated; that they will not remove or permit to be removed from the premises above described any portion of the alcohol thereon stored and not used for the purposes above specified; that they will from time to time, as may be required, truly account for all alcohol received or remaining on said premises, and all alcohol used by them, and for all articles manufactured by them, or removed from their said premises; and they will give due notice to the collector of internal revenue for the district in which said premises are located of any intended change, either as to the kind of articles to be manufactured by them or as to the process to

be employed in the manufacture thereof, and that they will at all times keep the said premises, and all buildings thereon, open to the inspection of any internal-revenue officer, and will allow such officer to examine the process by which the alcohol is used in the manufacture of any of said articles, or is recovered during or after such process of manufacture; and will at all times furnish, for examination or analysis, samples of any articles stored on said premises as may be selected by said officer.

— — —  
— — —

Sworn to before me this — day of —, 1894.

— — —. [SEAL.]

15 (In case of a firm or company (not incorporated) the notice must be signed and sworn to by each member. In case of an incorporated company the notice will be signed and sworn to by a duly authorized officer of the company.)

Article 6. A renewal notice will be required of each manufacturer on the first day of July in each year, except where an original notice has been filed within 30 days prior to that date. Also, in case of change in the ownership of the premises described, or in case of any material change in the producing capacity of the factory, or in the construction or arrangement of any still or condenser on the premises, and at such other times as may be required by the Commissioner of Internal Revenue or the collector of the district.

Article 7. The bond to be filed by the manufacturer will be in duplicate and in the following form:

(Form —.)

*Manufacturer's Bond.*

(Alcohol to be used for manufacturing purposes.)

Know all men by these presents, that we, — — —, as principal-, and — — — and — — —, as sureties, are held and firmly bound unto the United States of America, in the sum of — dollars, for the payment whereof to the United States we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals at —, this — day of —, 189—.

Whereas the above-bounden principal- intend to manufacture certain articles on the premises owned, or to be occupied by them, and located at —, county of —, State of —, and to use in the manufacture of said article alcohol on which a rebate of the internal-revenue tax will be claimed under the provisions of an act of Congress of August 28, 1894.

Now, therefore, the condition of this obligation is such that if the said principal- shall, as to all such alcohol received or remaining on the said premises, use the same solely in the manufacture of said articles, and in the manner described in their notice filed with the collector of internal revenue for the — district of —, and



shall from time to time, and in the manner required by regulations issued pursuant to said act, truly account for all alcohol received, used, or remaining on said premises, and for all articles manufactured or removed from said premises, and shall likewise comply with all other requirements of said regulations, then this obligation to be void; otherwise to remain in full force and virtue. And the obligors for themselves, their heirs, executors, administrators, and assigns, do further covenant and agree with the United States in case the said principal, his agents or employees, shall use or remove from the aforesaid premises, or permit to be used or removed, any alcohol otherwise than as above specified and authorized by the aforementioned act and regulations, or shall fail or neglect to do or cause to be done any of the acts or things hereinbefore specified or required by said act and regulations, or shall claim, or seek to obtain, a rebate of tax on any alcohol not used for the purposes specified in their notice and in their application for rebate, well and truly pay or cause to be paid to the collector aforesaid double the amount of tax on spirits so used or removed or on which such rebate of tax is wrongfully or fraudulently claimed, and a penalty of \$2,000 in addition thereto.

_____	_____	[ L. S. ]
_____	_____	[ L. S. ]
_____	_____	[ L. S. ]

Article 8. In preparing the bond the following instructions must be particularly observed and complied with, viz:

1. The Christian names must be written in the body of the bond in full, and so signed to the bond, and the execution must be duly acknowledged by each of the signers before the collector or deputy collector, or an officer authorized to take the acknowledgment of deeds. When a bond is signed by an officer of a corporation the seal of the corporation must be affixed, and evidence of the authority of the officer to sign and to affix the seal filed with the collector and Commissioner of Internal Revenue.

2. The residence of each signer must be stated in the bond.

3. A seal of wax or wafer must be attached to each signature.

4. Each signature must be made in the presence of two witnesses, who must sign their names as such.

5. The bond must be properly dated and signed by at least *three* sureties (unless signed by an incorporated security company, duly qualified and approved), who must qualify (in real estate only) in an amount of not less than double the penal sum of the bond.

6. The sufficiency of the sureties should be shown by affidavits made on form 33.

7. The penal sum of the foregoing bond must at least equal double the amount of tax on the quantity of alcohol to be stored on the manufacturer's premises at any one time, and in no case be less than \$5,000.

#### *Renewal Bond.*

Article 9. A renewal bond will be required upon the renewal of the manufacturer's notice, as provided in article 6, and in case of

death, insolvency, or removal of the sureties, and at such other times as the Commissioner of Internal Revenue may direct.

*Store-room.*

Article 10. The manufacturer will, before filing the foregoing notice and bond, provide a suitable room or building on his premises, to be used solely for the storage and safe keeping of all alcohol received or recovered by redistillation on said premises. The windows in such room or building will be provided with solid shutters with secure iron fastenings, and where a room is provided in a building to be used for any purpose other than the storage of such spirits such room must be separated from all other rooms in the building by a solid brick or plank partition, as in the case of distillery warehouses.

The store-room so provided will be secured by a Government seal lock, and will remain in the joint custody of the manufacturer  
17 and the officer assigned to the manufactory (article 19), and must in no case be unlocked or remain open, unless in the presence of that officer or some person regularly designated to act in his absence and having the key to the Government lock.

*Receiving Tanks.*

Article 11. In order that an accurate account may be kept of the alcohol used in the manufacture of *each* article, the manufacturer will, before obtaining the alcohol, provide suitable tanks or other vessels for the storage of alcohol removed each day from the store-room, as provided in article 25. Each tank or vessel to be so used must have marked thereon, in plain letters, the name of the particular article which will be manufactured from the alcohol stored therein; and in no case must the name of more than one article be marked on any one tank.

*Manufacturer's Premises to be Inspected before Approval of His Bond.*

Article 12. Upon the receipt of the foregoing notice and bond the collector will carefully investigate the statements contained in the notice, and as to the sufficiency and responsibility of the offered sureties.

He will also have the manufacturer's premises inspected by a deputy collector, who will see that all regulations have been strictly complied with respecting the construction and arrangement of the storage-room, and that the statements contained in the manufacturer's notice as to the location of the premises and as to the character of the business to be carried on at the premises are true. The deputy will make report of his inspection in writing to the collector, who will, if satisfied therewith and with the notice and bond, indorse his approval on each of the papers and forward the duplicate notice and bond, together with the report of the deputy, to the Commissioner of Internal Revenue for review.

Article 13. The collector will, however, refuse to approve the notice and bond if, in his judgment, the parties filing the same intend to engage in business other than specified in their notice, or to fraudulently use any portion of the alcohol obtained by them.

In case the collector refuses to approve the notice and bond the manufacturer may appeal to the Commissioner, whose decision in the matter shall be final.

*License.*

Article 14. Upon the acceptance of the notice and bond by the Commissioner of the Internal Revenue a license in the following form will be issued to the manufacturer and forwarded to him through the collector of the district:

No. —.)

*License.*

(Form No. —.)

(Alcohol to be used for manufacturing purposes.)

TREASURY DEPARTMENT,  
WASHINGTON, D. C., — —, 189—.

— —, manufacturer, having filed the required notice and bond, is authorized, on payment of the internal-revenue tax, 18 — to withdraw from distillery warehouse or general bonded warehouse during the year ending June 30, 189—, — proof gallons of alcohol, to be immediately removed to the said manufacturer's premises, located at —, in the State of —, and there used solely for manufacturing purposes as specified in said notice and as authorized by the act of Congress of August 28, 1894.

— —,  
*Secretary (or Commissioner).*

Each license will bear a serial number, which will be used to designate the manufactory named in the license.

*Withdrawal of Alcohol from Bonded Warehouse.*

Article 15. The alcohol to be used under the foregoing provisions of law must be shipped directly from a distillery warehouse or general bonded warehouse to the manufacturer's premises; and, on making application for such withdrawal, the license issued to the manufacturer will be submitted to the collector of the district in which the warehouse is located, who will, upon the withdrawal of the alcohol, endorse upon the license in the columns provided for that purpose the quantity so withdrawn, the date of withdrawal, and the serial number of the packages. Under this requirement no rebate of tax will be made on any alcohol used for manufacturing purposes and not withdrawn from bonded warehouse as herein provided.

Article 16. On receipt of an application for withdrawal of alcohol under the license issued, the collector will instruct the officer gauging the spirits to mark upon each package the words "for manufacturing purposes;" and the collector will, in issuing the tax-paid

stamps for such spirits, and until suitable branding stamps are furnished, write across the face of such stamp the words "for manufacturing purposes, under act of August 28, 1894."

Article 17. Except as to the additional brand above prescribed, the packages containing the alcohol will be marked, branded, and stamped, as required in other cases of withdrawal, upon payment of tax.

In affixing the tax-paid stamps on such packages the gauger will, however, instead of pasting the entire stamp to the head of the package, paste only that portion to which a slip of paper has already been attached, so that the officer assigned to the manufacturer's premises may remove such stamps and attached coupons without mutilating the same. Such stamps, however, must in all other respects be fastened (tacked) to the packages, canceled, and varnished, as required by existing regulations.

Article 18. Upon the withdrawal of the alcohol from the warehouse, the collector will note such withdrawal upon the manufacturer's license, as above required, and will then forward the license to the collector in whose district the manufacturer's premises are situated, who will, after noting the withdrawal on the records of his office, deliver the license to the manufacturer.

#### *Assignment of Officer to Manufacturer's Premises.*

Article 19. Upon receipt of the alcohol so withdrawn, the manufacturer will at once notify the collector of the district, who  
19 will assign to the manufacturer's premises such officer as may be authorized by law for that purpose. Such officer must in every case be thoroughly informed on the subject of gauging distilled spirits, and should be selected with reference to the business to be carried on at the premises to which he is assigned.

The officer so assigned must be in daily attendance at the manufactory while in operation, and in case the manufactory is to be operated at night, the collector will, on notice thereof, assign an additional officer for duty at such times.

#### *Duties of Officers.*

Article 20. The officer so assigned to duty will at once carefully gauge the alcohol received by the manufacturer, and note any discrepancy, either outage or excess, between the actual contents of each package and the marks and brands thereon. He will then have the regauged packages immediately removed to the store-room, and will under no circumstances allow any portion of such alcohol to be removed therefrom except as herein authorized. The officer will likewise gauge and store all alcohol subsequently received on the manufacturer's premises.

The officer will also keep a daily record of all alcohol received on the premises, and the quantity delivered each day to the manufacturer, and he will inspect all articles received on the manufacturer's premises and all articles removed therefrom. He will

familiarize himself with the process of manufacture carried on at the premises, so far as relates to the use of alcohol or its recovery during the manufacturing process, and he will at once report to the collector and Commissioner of Internal Revenue any violation of the regulation issued on the subject, or any matter connected with business as carried on by the manufacturer, which, in his judgment, indicates a fraudulent use of the alcohol on which rebate is claimed. (For instructions as to the methylation of alcohol in certain cases, see art. 21.)

The officer will at such times, or when so required, select samples of the manufactured articles, and forward the same to the Commissioner for examination and analysis, and he will see that all labels and outside wrappers used on the manufactured article have printed thereon the notice prescribed in article 26 of these regulations before such articles leave the manufacturer's premises. (For form of monthly report of officer, see article 29.)

### *Methylation.*

Article 21. Where alcohol is to be used in the manufacture of articles other than medicinal preparations, or other like compounds, such alcohol must be first methylated by the manufacturer and in the presence of the officer before being removed from the store-room. The methyl (wood alcohol) must be provided by the manufacturer and must be of standard strength, and will be added to the tax-paid alcohol in the proportion of one to ten (*i. e.*, one wine gallon of methyl to ten wine gallons of tax-paid alcohol), or in a larger proportion if required by the Commissioner of Internal Revenue.

The methyl to be so furnished must also be deposited in the store-room (article 10), and a sample of each lot received must be furnished to the Commissioner, and be approved by him, before being used as above provided.

### *Delivery of Alcohol from Store-room.*

Article 22. When the manufacturer has occasion to use the alcohol so stored, the officer will deliver the same to the manufacturer in quantities not exceeding that required for immediate use during a period of twenty-four hours.

The gauger will carefully gauge or measure the alcohol so delivered, and will see that the same is immediately placed in the tanks bearing the name of the article to be manufactured.

When the alcohol so removed is to be placed in two or more tanks the gauger will note the quantity placed in each of such tanks. He will, however, in no case deliver alcohol from the store-room if the manufacturer has on his premises any alcohol not withdrawn from warehouse as hereinbefore provided.

Article 23. In removing alcohol from the store-room the same must be taken from the packages in the order the packages are numbered, commencing with the lowest serial number; and no alcohol shall be removed from a package until the entire contents

of the package bearing the next lowest serial number has been entirely emptied.

Article 24. As soon as the entire contents of a package have been removed the officer will carefully detach the tax-paid stamp and annexed coupons and retain the same in his possession until the manufacturer has prepared and signed his application for rebate of the tax represented by such stamps, at which time the officer will, after verifying the application by his records and appending his certificate thereto (article 33), deliver such stamps to the manufacturer.

*Use of Alcohol.*

Article 25. The alcohol so delivered to the manufacturer, and after being deposited in the proper tanks, may be used for the purposes as specified in the manufacturer's notice, and for no other purpose. No portion of the alcohol deposited in one tank shall be used for any purpose other than in the manufacture of the article as marked on that tank; and no tank shall be marked with a name of more than one article to be manufactured.

The quantity of alcohol deposited each day in each of such tanks, and the quantity removed therefrom each day, must be carefully noted and entered on the record prescribed in article 28.

The manufacturer will also enter on said record the quantity of each article manufactured each day and the quantity of each removed for consumption or sale.

*All Packages to be Labeled.*

Article 26. All manufactured articles containing alcohol on which a rebate of tax is to be claimed must have affixed to each bottle or package containing the same a registered label showing the quantity of alcohol contained therein. Such label will be in the following form, and must be printed on the manufacturer's label affixed to each such bottle or package, and also on the outside wrapper inclosing such bottle or package. The label to be used must be first submitted to the Commissioner of Internal Revenue for approval and registry.

NOTICE.

The article to which this label is affixed contains \_\_\_\_\_\* per cent. of alcohol on which REBATE OF INTERNAL REVENUE TAX has been claimed.

Registered. No. —. \_\_\_\_\_ Manufacturer.

\* Number to be here inserted. If methylated alcohol is used, the word *methylated* will also be inserted.

Article 27. The label above prescribed must be at once affixed to all such articles, and a failure to so label the articles will be a violation of this regulation, and will render the manufacturer liable for

the penalty conditioned in his bond. In order that the articles so manufactured and labeled may be kept separate from other like articles produced from alcohol on which no rebate can be allowed, the manufacturer will provide a separate room for the storage of such articles, and such room and the contents therein stored must at all times be accessible to the officer assigned to the premises.

*Records to be Kept.*

Article 28. Every manufacturer using alcohol as herein provided will keep a daily record showing—

1. The quantity of alcohol received on the premises (specifying serial number of package, and wine, proof, and taxable gallons).

2. If spirits are to be methylated, the quantity of methyl received and quantity used, and the quantity of spirits so methylated.

3. The quantity of alcohol removed from the store-room, and the quantity deposited in each storage tank.

4. The quantity of alcohol removed from each such tank.

5. The quantity of each article manufactured in which alcohol was used.

6. The quantity of each of such articles removed from the premises.

The manufacturer will, on the first day of each month, forward to the collector and to the Commissioner of Internal Revenue a sworn transcript of said record.

Article 29. The officer will keep a daily record, to be furnished for that purpose, showing the quantities of alcohol received, methylated, used, and remaining on hand, and he will, on the first day of each month, render a report, in the form to be prescribed by the Commissioner of Internal Revenue, covering the transactions during the preceding month.

*Samples.*

Article 30. The officer will, at such times as the Commissioner of Internal Revenue may direct, or at such times as he has  
22 reason to suspect that the alcohol obtained by the manufacturer is being improperly used, select one or more samples of the manufactured articles and forward the same to the Commissioner for analysis.

Article 31. If upon such analysis the articles are found to be essentially different from those described in the manufacturer's notice and the formula submitted by him, or to contain a less quantity of alcohol than shown by the label, the license granted the manufacturer will be revoked and proceedings instituted on his bond.

The license will also be revoked and suit instituted in case the manufacturer fails to comply with all the requirements of the law and the foregoing regulations; and no rebate will be allowed after the revocation of such license.



*No Rebate on Alcohol Lost in Transit.*

Article 32. As the rebate of tax authorized by the act of August 28, 1894, is limited to alcohol actually used for the purposes therein specified, no rebate will be allowed on alcohol lost in transit or while stored on the manufacturer's premises.

Losses resulting from evaporation, or from other causes incident to the process employed in the manufacture of the articles specified in the manufacturer's notice, will not, however, be deducted in computing the rebate due where such loss is not deemed excessive.

*Claims for Rebate.*

Article 33. All applications for rebate of tax under the above-named act must be under oath, and the quantity of alcohol on which such rebate is claimed and the quantity of each article manufactured therefrom must be clearly stated therein.

The claim in such cases will be prepared on blank forms, to be furnished the manufacturer, and must include only so much of the alcohol as has been actually used during the preceding month, and covered by the tax-paid stamps to be furnished with such claim.

The claim in such cases must also be verified by the officer assigned to the manufacturer's premises, and when so verified will be forwarded to the collector of the district, who will, if satisfied with the proofs submitted, indorse his approval thereon, and forward the papers in the case to the Commissioner of Internal Revenue. In case the collector is not fully satisfied that the claim is a valid one, he will require such further proof as he may deem necessary, and unless such proof is furnished, no rebate of tax will be allowed. Nor will such rebate be allowed when the payment of the tax on the alcohol used is not fully established by the tax-paid stamps furnished by the claimant.

## IX.

The amounts appropriated in the urgent deficiency act of January 25, 1895, for an increased force in the Bureau of Internal Revenue (28 Stats., 637), aggregating \$245,095, are the amounts reported in the Secretary of the Treasury's estimate, transmitted to Congress December 4, 1894, as necessitated by the income-tax provisions of the act of August 28, 1894.

*Conclusion of Law.*

Upon the foregoing findings the court decides as a conclusion of law that the petition be dismissed.

23

VI.—*Opinion of the Court.*

WELDON, J., delivered the opinion of the court:

On the 20th of April, 1895, the claimant filed a second amended petition (by leave of the court), which embraces a full statement of

his claim; in which it is substantially alleged, that prior thereto he had been engaged under the name and style of Robert Dunlap and Company in the city of Brooklyn, in the State of New York, in the manufacture of a product of the arts known and described as "stiff hats."

That between the 28th of August, 1894, and the 16th of March, 1895, the claimant found it necessary to use and actually and necessarily did use in the manufacture of dissolved "shellac," the ingredient used to stiffen hats, 2,604 proof gallons of alcohol upon which a tax had been paid to the United States at the rate of 90 cents per proof gallon, and also used 4,455<sup>1</sup>/<sub>10</sub> proof gallons on which a tax of \$1.10 per gallon had been paid. The petition further alleges, that on or about the 10th of October, 1894, the claimant gave notice to the collector of internal revenue for the district in which claimant's business was carried on, that he was using alcohol in the manufacture of said products, and requested him to take such official action relative to the inspection as the law and regulations might require; that thereafter on the 12th of January and the 22d of March, 1895, he the claimant tendered to the collector testimony and affidavits showing the amount of alcohol consumed in the manufacture of dissolved "shellac," an ingredient used in making said hats, and showing that a tax had been paid to the United States on the alcohol, exhibiting the stamps and offering to deliver to the collector the same, to the end that the claimant might receive from the Treasurer of the United States a rebate of the tax so paid by him.

It is further alleged that the collector, acting under the decision of the Secretary of the Treasury, then and there declined to receive such stamps or such affidavits, and declined to take any steps whatever under the sixty-first section of the act of Congress of August 28, 1894.

It is also shown by the allegations of the petition, that the Secretary of the Treasury on the 7th day of October, 1894, decided that until further action by Congress, it was not possible to establish and enforce a regulation under the act aforesaid, and instructed the Commissioner of Internal Revenue to take no further action in the matter at present.

It is also alleged, that the failure of the Secretary to prescribe regulations as required by said act, and the failure of the collector of internal revenue to receive affidavits and testimony constitute no bar to the claimant's right of recovery against the defendants.

The findings in substance show, that the claimant was, as it is alleged, at the time and place a manufacturer of "stiff hats" and that in such manufacture he used 2,604.17 gallons of domestic alcohol on which a tax had been paid of 90 cents amounting to the sum of \$2,344.40 and 4,456.78 gallons of domestic alcohol on which a tax had been paid at the rate of \$1.10 per gallon amounting to the sum of \$4,900.81, making in the aggregate the sum of \$7,244.20; and that on several occasions he tendered to the collector of the district evidence tending to show the use and consumption of said amount of alcohol, exhibited and offered to deliver to the collector

evidence showing that the tax had been paid on the alcohol; but the collector acting under the instructions of the Secretary of the Treasury declined to receive the stamps, affidavits or other evidence. The failure and refusal of the collector to receive and recognize the evidence offered by the claimant was owing to the failure of the Secretary of the Treasury in not preparing and prescribing regulations under the sixty-first section of the act of August 28, 1894.

On the 3d of October, 1894, the Commissioner of Internal Revenue addressed a letter to the Secretary of the Treasury as follows, to wit:

SIR: I have the honor to report that the preparation of regulations governing the use of alcohol in the arts and manufactures, with rebate of the internal-revenue tax as provided by section 61 of the revenue act of August 28, 1894, has been and is now receiving very serious consideration from this office, and many communications have been received from, and personal interviews had with, manufacturers who use alcohol in their establishments; and it is found, in every case without exception, all agree that no regulation can be enforced without official supervision, and that, without such supervision, the interests of manufacturers and of the Government alike will suffer through the perpetration of frauds.

As it is found to be impossible to prepare these regulations in a way that will prove satisfactory without official supervision, I have the honor to inquire whether there is any appropriation or any general provision of law authorizing the expenditure of money by this department needed to procure such supervision.

To which letter the Secretary replied as follows:

SIR: Yours of the 3d instant inquiring whether there is any appropriation or general provision of law authorizing the expenditure of money by the Treasury Department or by the Commissioner of the Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August, 28, 1894, is received, and in response I have the honor to state that no appropriation whatever, either special or general, has been made by Congress for the purpose mentioned, or for any other purpose connected with the execution of the section of the statute referred to.

On the 5th of October, 1894, the Commissioner replied to the Secretary as follows:

SIR: I have the honor to acknowledge the receipt of your letter of the 5th instant, in reply to my letter of the 3d instant, in which you state that no appropriation whatever, either special or general, has been made by Congress authorizing the expenditure of money by the Treasury Department or by the Commissioner of Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, or for any purpose connected with the execution of the section of the statute referred to.

In reply I would suggest that, inasmuch as I have been unable, as stated in my letter of the 3d instant, after thorough consideration of the matter, and upon consultation by letter and by personal interview with a large number of the most prominent manufacturers, to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress, that the preparation of these regulations be delayed until Congress has opportunity to supply this omission.

To which the Secretary replied as follows :

SIR: Your communication of yesterday in reference to the execution of section 61 of the act of August 28, 1894, and advising me that, for the reasons therein stated, you are unable "to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress," is received. I have also given much attention to the subject, and have fully considered all the arguments and suggestions submitted by parties interested in the execution of the section of the statutes referred to, and have arrived at the conclusion that, until further action is taken by Congress, it is not possible to establish and enforce such regulations as are absolutely necessary for an effective and beneficial execution of the law.

You are therefore instructed to take no further action in the matter for the present.

In consequence of that letter the following circular was issued by the Commissioner of Internal Revenue:

TREASURY DEPARTMENT,  
OFFICE OF INTERNAL REVENUE,  
WASHINGTON, D. C., *November 24, 1894.*

In view of the fact that this department has been unable to formulate effective regulations for carrying out the provisions of section 61 of the act of August 28, 1894, relating to the rebate of tax on alcohol used in the "arts, or in any medicinal or other like compounds," collectors of internal revenue will, on receiving notice from manufacturers of the intended use of alcohol for the purposes named, advise such manufacturers that, in the absence of regulations on the subject, no official inspection of the alcohol so used, or the articles manufactured therefrom, can be made; and that no application for such rebate can be allowed or entertained.

On December 9, 1894, the Secretary of the Treasury in his annual report to Congress stated in substance, that owing to the defects in the legislation, the department was unable to execute the  
25 provisions of the sixty-first section of the act of 1894, and that after a full consideration of the subject and an unsuccessful attempt to frame regulations which without official supervision would protect the Government and the manufacturers, the department was constrained to await the further action of Congress. In

that connection the Secretary estimated that the drawbacks provided for in the act would amount to \$10,000,000 per annum, and that the cost of the necessary official supervision would not be less than \$500,000 per annum.

At the request of the counsel for the defendants, the court has embraced in its findings the official action of the Secretary and Commissioner and further official proceedings which do not strictly form a part of the necessary findings of the court, and which it is not important to note in this connection.

The sixty-first section of the statute upon which the alleged right of recovery is based reads as follows: "Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or the repayment of the tax so paid." (Supp. R. S., vol. 2, 266, p. 330.) The act is entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," and took effect on and from its passage (*United States v. Burr*, 159 U. S., p. 78).

The contention of the plaintiff is, that by the terms of the statute a grant was made *in presenti* to all persons who after the passage of the law find it necessary to use alcohol in the arts, or in any medicinal or like compound, and who actually use the same; that the right to a rebate or repayment of the tax paid upon such alcohol does not depend upon regulations to be made by the Secretary of the Treasury; that the right of repayment is complete and perfect by the grant and the fact of use, and not conditional upon regulations to be prescribed by the Secretary and the compliance by the manufacturer with such regulations.

Upon the part of the defendants it is contended that without regulations the right of the manufacturer is incomplete; that Congress left to the Secretary the right to determine the question of fact whether any regulations which he had the power to prescribe and enforce would adequately protect the revenue and the manufacturers, and he having determined that question in the negative no right to a rebate arose.

Very able and elaborate briefs have been filed upon the part of both parties in defense of their respective theories, and the court has in the investigation and determination of the cause been materially assisted by the labors of counsel.

The provisions of the statute upon which the contention has arisen embrace a subject-matter which for a period of more than thirty years has been a fruitful source of congressional legislation and judicial controversy, commencing in 1862, and extending to the time of the enactment of the law of August 28, 1894.

26 Many statutes have been passed by Congress, both civil and criminal, having reference to a tax on distilled spirits, the

collection of such tax by an elaborate system of regulations, and the enforcement of its payment by the enactment of severe penal laws against persons attempting to evade the enforcement of the law. The Internal Revenue Department having charge of that branch of the public service has, as is known from common knowledge, encountered serious and vexatious difficulties in devising regulations and adequate means to protect the interests of the Government against fraudulent evasion of the law; and the courts of the United States in their civil and criminal jurisdiction have been frequently engaged in the trial of causes which originated from violations of the revenue laws applicable to distilled spirits.

In the construction of the statute it is proper for the court to take into consideration the circumstances under which it was enacted, and in the light of those circumstances consider the purpose and will of the legislature in construing the words used in the law. As has been said by the Supreme Court it is not proper for the court to recur to the views of individual members nor to consider the motives which influenced them in voting upon a given measure. "But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions." *Union Pacific Railroad v. United States*, 91 U. S., p. 72.

In the passage of the law of 1894, and the enactment of the sixty-first section, Congress had two purposes in view, the first was to raise a revenue from distilled spirits by the imposition of a heavy tax, and the second was to favor the manufacturer by a rebate and repayment of the tax on all alcohol used by him in the course of his trade and business. The tax was to be imposed and paid absolutely, unless the article was brought within the exemption of being used in the arts subject to the law, when by a repayment or rebate it was to be relieved of the burden of taxation for the benefit of the manufacturer. The revenue to be derived from the tax was the main purpose and policy of Congress, and the exemption for the benefit of the manufacturer was the secondary or subordinate purpose to be accomplished in the operation of the law.

Revenue is absolutely necessary to the existence of the Government, without which it could not exist; and perhaps the most troublesome duty in connection with the public service is in the department of taxes in the efficient enforcement of the law in the collection of the revenue. This has been found especially true in relation to the tax on distilled spirits ever since the adoption in 1862, of the policy of taxing them at very high rates of assessment. Enactment, surveillance and evasion have been the contending forces as is abundantly established by the history of the public service extending through many years in dealing with the subject of what is popularly known as the whisky tax. As is said by the Supreme Court, the object of the law in all its stringent provisions is to prevent fraud on the revenue and to secure the tax levied. (*Felton v. United States*, 96 U. S., 703.)

The act of 1894 imposed an additional tax on the manufacture of



27 alcohol for the purpose of increasing the revenue of the Government from that source, leaving substantially in force the provisions of law and the regulations of the department, thereby insuring the collection of the tax and the compliance of the manufacturer with certain conditions which from experience it was shown were necessary to insure the prompt and faithful collection of the assessment upon that particular product. In derogation of the general purpose to impose an additional tax on alcohol and thereby increase the revenue, Congress by the incorporation of section 61, into the act of 1894, provided that alcohol under certain circumstances should be relieved by rebatement from the burden imposed on it by other provisions of the statute. The same policy which through many years of the internal-revenue system of taxation had been adopted for the protection of the Government against the illicit manufacture of distilled spirits was continued, and no substantial change was made in the system of rules and regulations by which the rights of the defendants and honest manufacturers were protected against the fraud and competition of illicit distillation.

The policy of the exemption provided by section 61 had been considered many times in Congress, in 1882 (13 Cong. Rec., pp. 5325, 5360-'4), in 1886 (17 Cong. Rec., 341, 394, 582) and in the Senate of the Fiftieth Congress (Sen. Doc. No. 2332), and in the same Congress which enacted the law of 1894 a proposition to exempt alcohol used in the arts was rejected, so that while the provisions of section 61 became a part of the law by amendment after the bill had been under consideration for many months, it was not new in principle as a measure of discussion and consideration. The large number of claims which have originated under the provisions of section 61 show that it is a measure of far-reaching effect, and by its operation diminishes to a very material extent the revenue which would otherwise be raised from the tax on distilled spirits under the act of 1894; and while Congress were desirous of assisting the manufacturer in the production of his product by affording cheap material, the policy of the law in raising revenue for the expenses of the Government and the protection afforded by precautions against fraud by necessary and wise regulations were not disregarded. We make these general observations tending as they do to show the light in which must be construed the terms of section 61, on which the right of the claimant depends.

Many cases have been cited to sustain the different theories of construction contended for by the parties, the plaintiff insisting that the question has been definitely settled by decisions of the Supreme Court and the defendants contending that the construction insisted on by them is sustained by a proper application of the decisions of the court to the peculiar facts of this case. If the alleged cause of action of the claimant is dependent upon the action of the Secretary of the Treasury, and without such action the right is not consummate, then it is immaterial whether in law the refusal of the Secretary to prescribe regulations was justifiable. If he failed for any reason to perform a duty essential to the claimant's cause of action,



his failure is fatal to the right of recovery on the part of the claimant and no remedy can be afforded to him in this proceeding.

This being a suit to recover the rebate, it is not necessary to examine and discuss the question as to what might have been the rights of manufacturers to compel the Secretary to prescribe regulations under which they might have been protected in the enjoyment of the benefits intended to be secured to them by the provisions of section 61.

In the case of *Campbell v. United States* (107 U. S., 407) a controversy similar to the one involved in this case was determined by the Supreme Court on appeal from this court. By the fourth section of the act of August 5, 1861, ch. 45, it was provided, "That from and after the passage of this act there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury." Under that act in January, 1862, the Secretary established such regulations as he deemed appropriate.

The regulations after having required certain acts on the part of the exporter provided that "all this having been done and the oath of the exporter and his bond with condition prescribed by the rules being given the collector is to give a certificate of the amount to which the party is entitled as a drawback on which he is to receive the money."

The plaintiff sued in the Court of Claims for a drawback, on account of a large amount of linseed cake made by them out of linseed imported from a foreign country and which they exported to London. The court dismissed the petition on the ground as stated in the opinion that it was not a cause of which the court had jurisdiction. The court, however, upon an issue being made found the facts upon which the conclusion of law dismissing the case for want of jurisdiction was based. After a statement of the facts as found by the Court of Claims the Supreme Court says:

The argument of counsel for the United States is, that until the officers of the customs comply with all the regulations of the Secretary of the Treasury, and the collector issues the drawback certificate, the law imposes on the United States no obligation to pay anything for such drawback; that the law conferred on the Secretary the right to make the regulations, and the collector the power to make the certificate for payment of drawback, and that the refusal of the collector to perform the duties imposed upon him preliminary to making his certificate, and then refusing the certificate totally defeats the claim of the party, who, by the law, is guaranteed a right to his drawback, and who has complied with all that the law requires of him to secure and enforce it. To the same effect is the opinion of the Court of Claims.

It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive a drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the Secretary by regulations, which might be

proper to secure the Government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable.

But the regulations in this case are not unreasonable, nor do they interpose any obstacle to the full assertion and adjustment of plaintiff's rights. It is the order of the Secretary of the Treasury forbidding the collector to proceed under these regulations or in any other mode, which is the real obstacle. Is that order a defense to this action? Can the Secretary, by this order, do what he could not do by regulations; repeal or annul the law? Can he thus defeat the law he was appointed to execute, by making regulations, and then by ordering his officers not to act under them, and not to act at all, place himself above the law and defy it?

We think the Court of Claims has jurisdiction of such a claim: (1) Because it is founded on a law of Congress; and (2) because the facts found in this case raise an implied contract that the United States will refund to the importer the amount he paid to the Government. \* \* \*

The act of Congress having declared that on exportations there shall be allowed a drawback equal in amount to the duty paid on such material, and the Secretary having established by a regulation that, as regarded the cake resulting from the manufacture of the linseed into oil and cake, the latter represents at 17 cents per hundred pounds the duty on the imported seed so converted into cake,

there resulted a contract that when exported the Government would refund, repay, pay back, this amount as a drawback to the importer. If this be not so, it is because it is impossible to make a contract when the details of its execution or performance are left to officers who refuse to carry them out.

So it is equally clear that this claim is founded on the law allowing drawback.

The Court of Claims makes the mistake of supposing that the claim is founded on the regulations of the Secretary of the Treasury.

The counsel for plaintiff has cited in his opening brief the case of *Railroad Company v. Smith* (9 Wall., 95) which is cited in the opinion of the court in the Campbell case. That case originated under the provisions of the act of September 20, 1850, chapter 84, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands" within their limits, the first and second sections of which provide:

First section says that, "the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to States.

Second. "That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas and, at the request of said governor, cause a patent to be

issued to the State therefor; and on that patent, the fee-simple to said lands shall rest in the said State."

The duty devolved on the Secretary was wholly neglected, and in the case of Smith it was insisted that the failure of the Secretary to act as required by the law made the lands subject to a grant for railroad purposes of a date subsequent to the swamp-land act, but the court said:

Must the State lose the lands, though clearly swamp land, because the officer has neglected to do this? The right of the State did not depend on his action, but on act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. \* \* \*

Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the States, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from plaintiff's grant.

This court has decided more than once that the swamp-land act was a grant *in presenti*, by which the title to those lands passed at once to the State in which they lay. (93 U. S., 170.)

In the case of *French v. Fyan* (93 U. S., 169, 173), the court, reaffirming the case — *Railroad Company v. Smith*, said:

There was no means, as this court has decided, to compel him (the Secretary) to act, and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty.

In speaking of the power of the officers of customs in the Campbell case (*supra*) the court said:

Their function is entirely ministerial. They are authorized to pass upon no question essential to the claimant's right so as to conclude him in a court of competent jurisdiction. From the moment he presents his sworn entry they simply ascertain quantities, identify and mark packages, accept bonds and sureties, and see that the export article leaves the port in the ship. These and like duties being discharged, it is the collector's duty—a mere ministerial function—to give the certificate of drawback. \* \* \* He exercises no judicial or quasi-judicial function. He concludes nobody's rights and has no power to do so. The rights which the law gives cannot be defeated by his refusal to act, nor by his decision that no drawback was due.

30 In the case of *Morrill v. Jones* (106 U. S., 466), cited in the brief of the claimant's counsel, decided at the same term with the Campbell case, it is in substance held that the right of a rebate is consummate by the provisions of the law, and that a regulation

of the department introducing new conditions and qualifications not consistent with the purpose of the statute was null and void.

The law under which the rebate was claimed is as follows: Section 2505 of the Revised Statutes, "Animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free, upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe." By a regulation of the department it was provided that before the collector admits animals imported he must be satisfied that the animals are of a superior stock adapted to improving the breed of the United States. The court held that the regulation was in excess of the power of the Secretary as the statute clearly included animals of all classes imported for breeding purposes. The Secretary prescribed the regulations but they included an unauthorized restriction. The importer complied with all the legal regulations.

In the case of *Aucher v. Howe* (50 Fed. R., 367, 368) the same view is taken recognizing the enforcement of the statute in the preservation of the grant against restrictions and regulations tending to diminish or destroy the right provided by the law.

In the case of the *United States v. Mann* (2 Brock, 1) Chief Justice Marshall said in substance that rules of the department which go to the denial of justice should be disregarded by courts and it has been repeatedly decided that Congress cannot confer the power of making laws upon executive officers. It is fundamental in constitutional law that the law-making power is exclusively in Congress and cannot be delegated to any other department. Laws are sometimes dependent in their enforcement upon a condition to be ascertained and determined by some person having executive power, but that exception to the almost uniform operation of all laws is not a grant of legislative power in derogation of the function of the legislature.

In the case of *Field v. Clark* (143 U. S., 649) involving the constitutionality of the tariff act of 1890 growing out of the reciprocity policy of that statute it is said "that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of Government. \* \* \* What the President was required to do was simply in execution of the act of Congress. It was not the making of law."

It is insisted by claimant, that the facts of this claim bring it within the law announced by the Supreme Court in the Campbell case and in the cases cited by the court in elaboration and support of the theory of that case, and that in this case as in those cases the right of rebate or drawback does not depend on what the Secretary might do or fail to do. In the case of the *Railroad v. Smith* (9 Wall., 95) affirmed in the Campbell case there was an absolute failure to act on the part of the Secretary of the Interior; in the other cases regulations had been prescribed, but the collector under the advice of the Secretary refused to allow the rebate on the ground that the claimants had not brought themselves within the requirements of the rules of the department.

31 The contention of the counsel for the defendants is, that the statute in this proceeding is different in its requirements

from the statute in those cases and that the facts of this proceeding do not bring the claim within the reasons and law of those cases. The industry of counsel has brought to the attention of the court many considerations, tending as he claims to establish the construction of the statute for which he contends, in showing a necessity for the action of the Secretary of the Treasury in the promulgation of rules and regulations to enforce the efficient collection of the tax provided by the act of 1894, in the prevention of frauds upon the part of persons engage in manufacture in the pretended use of alcohol. Before the consideration of the rights of the parties upon the words and phraseology of the law it may not be inexpedient to a correct conclusion upon the issue to further consider the facts so apparent from common knowledge, that the Government from its experience in the collection of what is known as the whisky tax did not intend to abandon the safeguards which experience had shown to be necessary (although perhaps inadequate) in the enforcement of the revenue laws against persons engaged in the manufacture of high wines.

This law, as have all laws since the adoption of the policy of deriving a large tax from alcohol, provides many safeguards for the assessment and collection of the tax; and consistent with that policy Congress have provided that after the payment of such tax enforced by a system of rules and regulations, strict and technical, the tax may be rebated in favor of persons engaged in manufacture, and who in such manufacture use alcohol which has been subjected to the exactions of the law in the payment of the tax.

As has been said, two purposes must be recognized as incident to the policy of the statute: First, the collection of taxes on all alcohol manufactured, and second, that no alcohol escape payment of the tax by being fraudulently exempted under the rebate provided in section 61. The allowance of a fraudulent rebate would be as disastrous to the collection of revenue as the failure to secure the collection of the tax from the manufacturer. These considerations become essential in the construction of the law providing exemption from the payment of the tax in favor of the class of persons enumerated in section 61. The exact language of the sixty-first section is as follows: "Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein and exhibiting and delivering up the stamps, which shows that a tax has been paid thereon shall receive from the Treasury of the United States a rebate or repayment of the tax so paid." (2 Supp. R. S., p. 330.)

The effect of the statute is to exempt from taxation alcohol used in the "arts or any medicinal or other like compounds" and to that extent it operates as a discrimination against persons who use and consume alcohol for any other purposes than those enumerated in the law. Equality is the fundamental theory of taxation and

statutes providing exemptions being in derogation of that theory are construed strictly. The Supreme Court in the case of the *Winona and St. Peter Land Company v. Wisconsin* (159 U. S., 32 529) says "It is a familiar law that statutes exempting property from taxation are to be strictly construed," and in support of that theory the court cites *Burch v. Tennessee* (104 U. S., 493); *Railroad Company v. Dennis* (116 U. S., 665); *Railroad Company v. Thomas* (132 U. S., 174); *Schurz v. Cook* (148 U. S., 397).

The liability of the Government and the correlative right of the claimant to a recovery are determined by the construction of the words "any manufacturer finding it necessary to use alcohol in the arts or in any medicinal or other like compound may use the same under regulations to be prescribed by the Secretary of the Treasury." These are the words which by construction determine the issue of this proceeding. If, as in the Campbell and other cases cited by counsel for claimant, there is a grant *in presenti*, by the terms of the statute, not depending upon the action of the Secretary, the case comes within those cases, and the claimant's right is consummate and complete without the action of the Secretary in the prescription of regulations.

In the Campbell case the controversy arose on the law of August 5, 1861, chapter 45, which provides as follows: "That from and after the passage of this act there shall be allowed on all articles wholly manufactured of materials imported on which duties have been paid when exported, a drawback equal in amount to the duty paid on such material and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury."

By this statute there is a grant *in presenti* to all persons who wholly manufacture articles of material, imported on which duties have been paid a drawback, when such manufactured article is exported, equal in amount to the duty paid on such imported material, which drawback is to be "ascertained under such regulations as shall be prescribed by the Secretary of the Treasury." The manufacture and exportation is not to be conducted and carried on under such rules and regulations as may be prescribed by the Secretary, but the extent of the drawback, measuring the rights of the manufacturer, is to be ascertained under such regulations as may be prescribed by the Secretary. The regulations of the Secretary do not become a part of the grant, but simply a means by which the drawback is to be determined as a matter of fact.

Mr. Justice Miller, in the case of *Railroad Company v. Smith*, *supra* (9 Wall., 95), says: "The first section of the act, after declaring the inducements to its passage, says that the whole of these swamp and overflowed lands, made thereby unfit for cultivation and unsold, are hereby granted to the States." The substance of that decision is that the act conferred a vested right to such lands, though the subsequent identification of them was a duty imposed upon the Secretary of the Interior.

In *Morrill v. Jones* (106 U. S., 466) the controversy arose on section 2505, Revised Statutes, in relation to the importation of cattle for breeding purposes. The Secretary sought to introduce an un-



authorized restriction, and the Supreme Court held that it was beyond the power of the Secretary to enlarge the requirements of the statute. The law provided that the cattle should be admitted free of duty upon proof satisfactory to the Secretary. The law made an exemption of cattle imported for breeding purposes, not dependent upon regulations prescribed by the Secretary, but provided by the very terms and assurance of the law. It was a grant of absolute exemption against all duty to persons importing into the

33 United States cattle having as the object of such importation a certain purpose. The Secretary added a qualification not required by the statute, and the Supreme Court decided, that the law was the full measurer of the claimant's responsibility and right, and that the regulations of the Secretary formed no part of the exemption and grant. In those cases the statutes giving the right are different in their phraseology from the statute involved in this controversy; and upon that difference the Supreme Court decided that a grant was made complete and consummate, not dependent upon the subsequent action of an executive officer. The regulations required and contemplated under those statutes were subordinate and provided a subsidiary means to ascertain the fact, but formed no part of the grant of right.

We have carefully considered the supplemental briefs filed by counsel, and the cases cited to support the theory of the claimant, but we do not find that the doctrine of those cases affect the construction of the statute in his favor.

In the case of *Bartram v. The United States* (77 Fed. Rep., 604) and other cases cited from the Federal Reporter, the line of judicial decision made by the Campbell case is followed, in regarding the grant as perfect, and not dependent upon the action of the Secretary. In the Bartram case the statute (act of August 28, 1894) provided for the admission of certain articles free of duty, "but the proof of the identity of such articles shall be made under the general regulations to be prescribed by the Secretary of the Treasury." The court said as to regulations: "None have been made under this paragraph at the time of these importations, and therefore none applicable were then in force. The failure to make them would not cut off nor suspend the right, but would leave none to be complied with."

As has been said (*supra*) in reference to the drawback in the Campbell case, the regulations do not become a part of the grant, but simply a means by which the amount of the drawback is to be determined as a matter of fact.

It is insisted in the supplemental brief of counsel for claimant that the proceeding is to recover a debt due from the United States for taxes paid; and that it is only a question of fact as to how much alcohol was used on which a tax had been paid. That theory of the claimant's right would be correct if it were not for the conditional character of the grant.

The grant in the statute under consideration is the right to use alcohol "under regulations to be prescribed by the Secretary of the Treasury," and when so used it is to be exempted from taxation by a rebate or repayment of the amount of tax paid by the distiller.



There can be no vested right in the manufacturer in the exemption of alcohol used by him unless it is used in pursuance to regulations prescribed by the Secretary of the Treasury, for the reason that the grant to him provides that he "may use the same under regulations to be prescribed." The prescription of the regulations by the Secretary forms a most essential part of the grant, and without the condition upon which the manufacturer is to have the exemption the grant fails. It may have been the duty of the Secretary to prescribe regulations (of that we express no opinion), but his failure to do so will not supply a necessary and essential element in the cause of the claimant. If the regulations "to be prescribed by the Secretary of the Treasury" form a part of the affirmative right of the claimant to the rebate, and the grant embodies as one of its essential elements such regulations, the want of such regulations cannot be supplied by the failure of the Secretary to prescribe regulations.

In view of the construction we have given to the language of section 61, it is unnecessary to discuss and examine the reasons assigned by the Secretary of the Treasury as a justification of his failure to prescribe regulations sufficient to protect the Government; but the failure may be considered as tending to indicate the construction which Congress in the consideration of his report placed on the act of 1894.

At the first session after the enactment of the law and the failure of the Secretary to prescribe regulations, he communicated to Congress the fact that no regulations had been prescribed for the reasons set forth in that report. Congress in view of such failure made no provision to meet the condition indicated in the report; but after a delay of nearly two years, to wit, on June 3, 1896, repealed so much of the law of 1894 as was embraced in section 61, and by the second section of the act authorized the appointment of a joint committee to "consider all questions relating to the use of alcohol in the manufactures and arts free of tax and to report their conclusion to Congress." (29 Stats., 195.) This may with great propriety be regarded as a legislative construction of section 61, as indicating on the part of Congress the belief that it was important and necessary that regulations should be prescribed; and that the use of alcohol with a right of rebate of taxes should be guarded with the same degree of vigilance that is exercised over the manufacture of the same.

In the construction of a statute it is the duty of the judiciary to determine the legislative intent and purpose and conform its construction as near as possible to that intent and purpose. The action of Congress upon the report of the Secretary has to some extent the effect of a declaratory act and therefore competent to be considered in determining the proper construction of section 61, not in retrospective operation to change the law from its expressed meaning, but to enable the court to properly solve doubts which arise from the ambiguous terms and provisions of the statutes. While it is the duty of the judiciary to determine for itself the construction of all laws involved in the case, it may with propriety consult the action of other departments. The right of the manufacturer to a rebate

being dependent on the regulations of the Secretary, such regulations are conditions precedent to his right of repayment, and therefore no right of repayment can vest until in pursuance of regulations the manufacturer uses alcohol as contemplated by the statute. The statute having prescribed certain conditions upon which the right of the claimant is predicated, and from which it originates, there can be no cause of action unless it affirmatively appears that such conditions have been complied with on the part of the claimant. This is a proceeding based upon an alleged condition of liability upon the part of the defendants, and it must be shown that all the essential elements of that condition exist before any liability can accrue. Conceding that it was the duty of the Secretary to prescribe regulations consistent with the purpose and requirements of the law, his failure to do so will not supply a necessary element in the cause of the claimant.

The judgment of the court is that the petition be dismissed.

35

VII.—*Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 6th day of December, A. D. 1897, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Robert Dunlap, be dismissed.

BY THE COURT.

36

VIII.—*Appeal to the Supreme Court of the United States and Allowance of Same.*

ROBERT DUNLAP	}	No. 18778.
vs.		
THE UNITED STATES.		

From the judgment rendered in the above-entitled cause on the 6th day of December, 1897, dismissing the claimant's petition, the claimant, Robert Dunlap, by his attorney of record, George A. King, on this 9th day of December, 1897, makes application for and gives notice of an appeal to the Supreme Court of the United States.

GEORGE A. KING,

*Attorney of Record.*

WILLIAM B. KING, *Counsel.*

The aforesaid application for the allowance of appeal having been filed in open court December 9, 1897, it was ordered that the same be allowed as prayed for.

BY THE COURT.

37

In the Court of Claims.

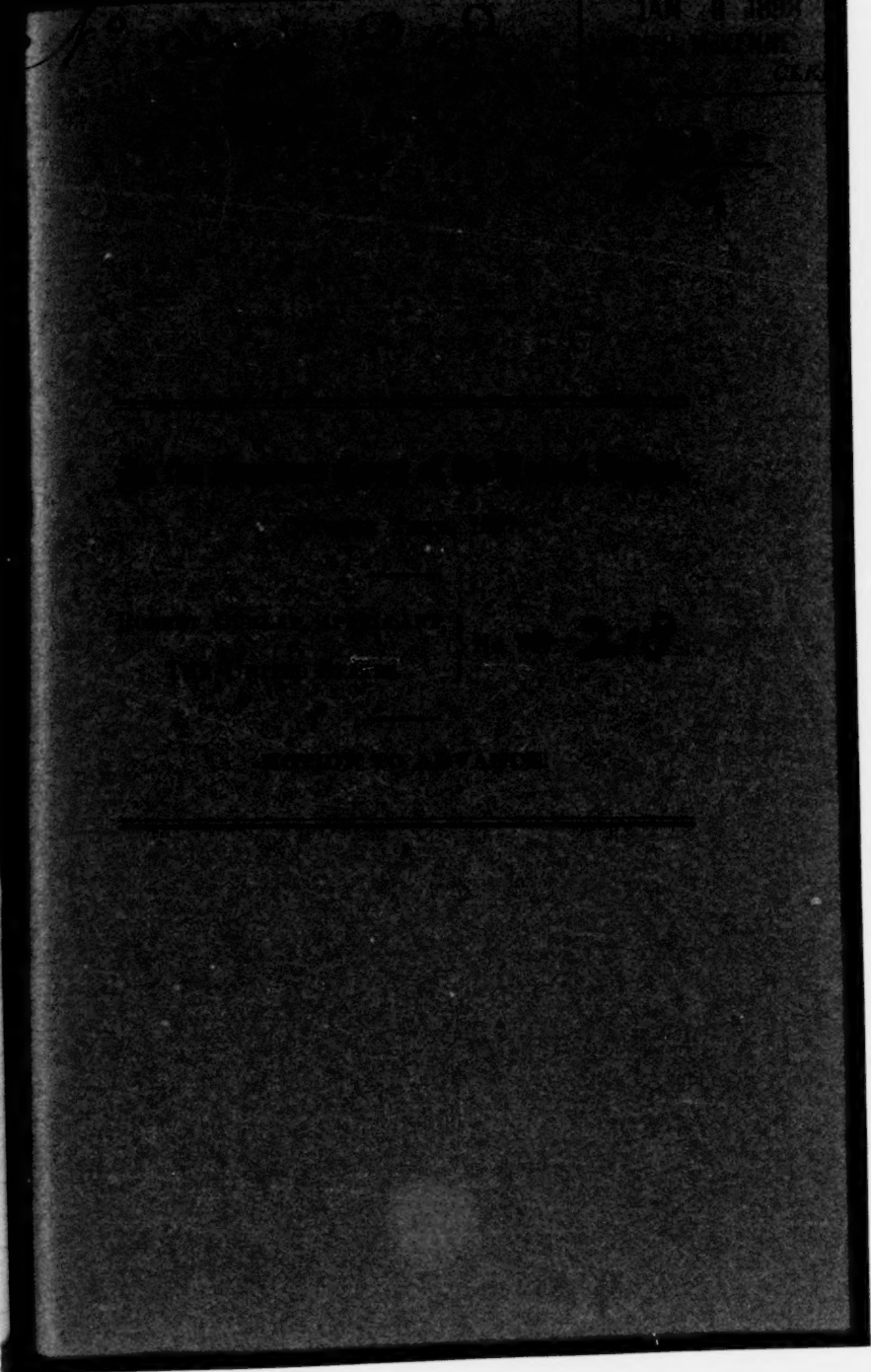
ROBERT DUNLAP, Doing Business under the Firm	}	No. 18778.
Name of R. Dunlap and Company,		
<i>vs.</i>		
THE UNITED STATES.		

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set  
Seal Court of Claims. my hand and affixed the seal of said court,  
at Washington, this 22d day of December,  
1897.

JOHN RANDOLPH,  
*Ass't Clerk, Court of Claims.*

Endorsed on cover: Case No. 16,760. Court of Claims. Term No., 547. Robert Dunlap, appellant, *vs.* The United States. Filed December 22d, 1897.



# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

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ROBERT DUNLAP, APPELLANT, }  
v. } No. 547.  
THE UNITED STATES. }

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## MOTION TO ADVANCE.

Now come counsel for the parties to the above-entitled cause and move the court to advance the same upon the docket and set it down for hearing at the present term, for the following reasons :

(1) This case is one of a large class involving the construction of section 61 of the act of August 28, 1894, which provides as follows :

Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has

been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid.

The question which was before the Court of Claims in the case just decided was whether regulations prescribed by the Secretary of the Treasury were an absolute prerequisite to any claim for rebate arising on the part of the manufacturer, and the Court of Claims has decided that they were.

(2) In the report for 1896 of the Assistant Attorney-General in charge of business in the Court of Claims the following statement is made on this point (Rept. Attorney-General 1896, p. 9):

These suits, described more fully in my report of November 1, 1895, have now reached 1,090 in number, representing claims not far from \$5,000,000, and are increasing in number weekly.

In view of the very large amount involved in these claims, the public interest demands that there should be an early decision, so that it may be known whether these form an existing obligation of the Treasury.

In view also of the large number of business firms and corporations in all parts of the country interested as parties claimant in cases depending upon this claim, they may properly ask that the case should be preferred in hearing to the many other cases before the Supreme Court involving merely individual interests.

The delay of two years in the hearing of the case, which would follow if not advanced, would result in injustice both to the Treasury and the large class of individual claimants who are concerned.

(3) If the decision of the Court of Claims should be sustained, it is highly important to the Government that that decision should be promptly rendered. The dockets of the Court of Claims can then be relieved of the large number of cases now upon them under this law and the Attorney-General will be able to make final disposition of them and be relieved of further responsibility in regard to them.

(4) If the decision of the Court of Claims should be overruled, then a special reason exists why expedition is of the utmost importance. The successful defense of these claims and the discrimination between claims well founded in fact and those without substantial justice will depend upon the ability of the Government, when a detailed investigation takes place, to secure oral testimony for the explanation of the books of the claimants. The papers and records of the claimants will establish their claims, and can easily be preserved, but defenses based upon an effort to show that the alcohol was not used for the purposes defined in the law must depend upon securing the testimony of witnesses who, between 1894 and 1896, were cognizant of the conditions of the origin of the claims. Time is one of the most important means for the destruction of oral evidence. With each year's delay the witnesses' memories grow less distinct and the possibilities of death and removal to parts unknown increase. The investigation of the claims in detail, if the Supreme Court should decide in their favor, will necessarily consume a considerable time. It is of the utmost importance that the point of beginning of such an investigation should be as near as possible to the inception of the



claims. If the case is now advanced, two years' time would probably be saved and the Government placed in a position where the defense of individual cases could be conducted with more certainty than if this time should be allowed unnecessarily to elapse through delay which might now be avoided.

JOHN K. RICHARDS,  
*Solicitor-General.*

GEORGE A. KING,  
WM. B. KING,  
*Counsel for Appellant.*

No. 218.

By of King, King, & King, Attorneys for Appellant.

U.S. SUPREME COURT  
NEW YORK  
OCT 20 1890

Term Oct. 20, 1890.  
Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 218.

ROBERT DUNLAP, *Appellant*.

THE UNITED STATES.

Brief for Appellant.

JOSEPH H. CHOATE,  
B. F. TRACY,  
*Of Counsel.*

GEORGE A. KING,  
WILLIAM B. KING,  
*Attorneys for Appellant.*

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1898.

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No. 218.

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**ROBERT DUNLAP, *Appellant,***

**v.**

**THE UNITED STATES.**

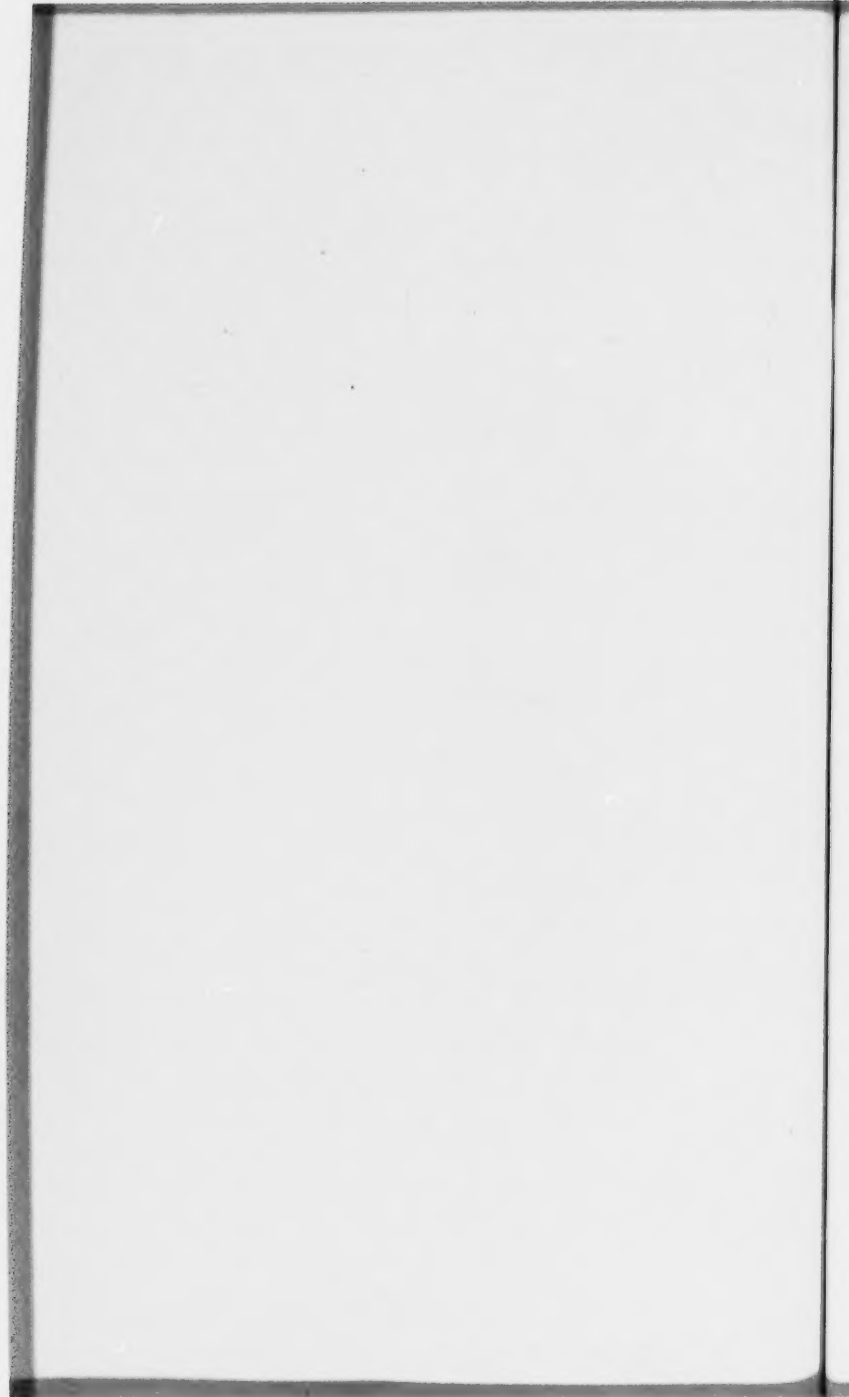
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**Brief for Appellant.**

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**JOSEPH H. CHOATE,**  
**B. F. TRACY,**  
*Of Counsel.*

**GEORGE A. KING,**  
**WILLIAM B. KING,**  
*Attorneys for Appellant.*



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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1898.

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ROBERT DUNLAP, *Appellant*,  
v.  
THE UNITED STATES. } No. 218.

APPEAL FROM THE COURT OF CLAIMS.

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**BRIEF FOR APPELLANT.**

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**STATEMENT OF CASE.**

This is an appeal from a judgment of the Court of Claims in favor of the United States in a suit for repayment of the tax paid upon alcohol used in the manufacture of dissolved shellac as stiffening in hats made by the claimant.

The claim is made under § 61 of the general revenue act of August 28, 1894, 2 Supp. R. S. 330, 28 Stat. L. 567, as follows:

“Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid.”

The Court of Claims thus summarizes the facts in the opinion (Rec. 22):

"The findings in substance show, that the claimant was, as it is alleged, at the time and place a manufacturer of 'stiff hats' and that in such manufacture he used 2,604.17 gallons of domestic alcohol on which a tax had been paid of 90 cents amounting to the sum of \$2,344.40 and 4,456.78 gallons of domestic alcohol on which a tax had been paid at the rate of \$1.10 per gallon amounting to the sum of \$4,900.81, making in the aggregate the sum of \$7,244.20; and that on several occasions he tendered to the collector of the district evidence tending to show the use and consumption of said amount of alcohol, exhibited and offered to deliver to the collector evidence showing that the tax had been paid on the alcohol; but the collector acting under the instructions of the Secretary of the Treasury declined to receive the stamps, affidavits or other evidence. The failure and refusal of the collector to receive and recognize the evidence offered by the claimant was owing to the failure of the Secretary of the Treasury in not preparing and prescribing regulations under the sixty-first section of the act of August 28, 1894."

The Commissioner of Internal Revenue (Rec. 7, 23) on October 3, 1894, wrote the Secretary of the Treasury that it was "found to be impossible to prepare these regulations in a way that will prove satisfactory without official supervision" and inquired whether there was any appropriation to defray the expenses of supervision.

The Secretary replied (Rec. 7, 23) on October 5, 1894, that no appropriation had been made for any purpose "connected with the execution of the section of the statute referred to."

The Commissioner replied (Rec. 8, 23) on October 5, 1894, that he had been unable "to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision which has not been provided for by Congress,"

and recommended that "the preparation of these regulations be delayed until Congress has opportunity to supply this omission." The Secretary answered (Rec. 8, 24) that he had "arrived at the conclusion that, until further action is taken by Congress, it is not possible to establish and enforce such regulations as are absolutely necessary for an effective and beneficial execution of the law." The correspondence appears in full in Finding VII (Rec. 7-9).

The court continues (Rec. 24):

"In consequence of that letter the following circular was issued by the Commissioner of Internal Revenue:

‘TREASURY DEPARTMENT,  
OFFICE OF INTERNAL REVENUE.

WASHINGTON, D. C., *November 24, 1894.*

In view of the fact that this department has been unable to formulate effective regulations for carrying out the provisions of § 61 of the act of August 28, 1894, relating to the rebate of tax on alcohol used in the 'arts, or in any medicinal or other like compounds,' collectors of internal revenue will, on receiving notice from manufacturers of the intended use of alcohol for the purposes named, advise such manufacturers that, in the absence of regulations on the subject, no official inspection of the alcohol so used, or the articles manufactured therefrom, can be made; and that no application for such rebate can be allowed or entertained.

"On December 9, 1894, the Secretary of the Treasury in his annual report to Congress stated in substance, that owing to the defects in the legislation, the department was unable to execute the provisions of the sixty-first section of the act of 1894, and that after a full consideration of the subject and an unsuccessful attempt to frame regulations which without official supervision would protect the Government and the manufacturers, the department was constrained to await the further action of Congress."

The claimant contended that, in the absence of regulations, his right to repayment of the tax was absolute

upon his use of the alcohol for the purposes named in the law, and that the failure of the Secretary of the Treasury to make effective regulations did not defeat the right granted him by Congress.

The Court of Claims decided (Rec. 35) that, to satisfy the statute, it was essential that the manufacturer should have used alcohol under regulations prescribed by the Secretary of the Treasury. Upon the ground that he had failed to prescribe any, and that the use had, therefore, not been "under regulations," it dismissed the petition.

### **ASSIGNMENT OF ERROR.**

For error, the appellant says that the court erred in rendering judgment against him, because the claimant's right was dependent upon the statute and, in the absence of regulations, he was entitled to judgment upon proof of the facts required by the statute.

### **ARGUMENT.**

#### **I. THE GENERAL PURPOSES OF THE ACT OF 1894.**

The act of August 28, 1894 (28 Stat. L. 509), is one of a series of general revenue laws (see act of March 3, 1883, 22 Stat. L. 488; October 1, 1890, 26 Stat. L. 567; July 24, 1897, 30 Stat. L. 151), which it is the legislative policy of this country to adopt from time to time. It contains provisions both for customs and internal taxes, and was avowedly based on a purpose declared in its title "to reduce taxation" and "to provide revenue for the Government." Its general intent has an important bearing on the construction of § 61, and can best be determined by considering the antecedent circumstances leading to its enact-

ment. This court said in *United States v. Union Pacific Railroad*, 91 U. S. 72, 79 :

"In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety, recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. (*Aldridge v. Williams*, 3 How. 24; *Preston v. Browder*, 1 Wheat. 120.)"

It is a matter of public history, and may, indeed, be inferred by comparison of the act of 1894 with previous revenue acts, that the purpose "to reduce taxation" was to be accomplished by reducing or abolishing the customs duties on raw materials and by reducing those on manufactured products; and that the purpose "to provide revenue," diminished by this course, was to be fulfilled by an increase of internal revenue taxes. Chief among these were the provisions for an income tax (§§ 27-37, 2 Supp. R. S. 316-323; 28 Stat. L. 553, 560), the imposition of a tax on playing cards (§§ 38-47, 2 Supp. R. S. 323-325; 28 Stat. L. 560, 562) and the increase of the tax on distilled spirits from ninety cents to a dollar and ten cents a proof gallon (§ 48, 2 Supp. R. S. 325; 28 Stat. L. 563).

## II. THE TAXATION OF DISTILLED SPIRITS.

### **Rates, Method and Percentage of Taxation.**

The taxation of distilled spirits has been "a fruitful source of Congressional legislation and judicial controversy" since the imposition of a tax by the act of July 1, 1862 (12 Stat. L. 447), the first tax on this product since

December 23, 1817 (3 Stat. L. 401). The tax then imposed at the rate of twenty cents a proof gallon was gradually increased until from 1866 to 1868 it was two dollars. It was then decreased to fifty cents, but raised by successive steps until the present tax of one dollar and ten cents.

The following are the various acts and the rates fixed by them :

Date of Act.	Vol.	Stat. L. page.	Amount.
July 1, 1862.....	12 Stat.	447	\$ 20
March 7, 1864.....	13 "	14	60
June 30, 1864.....	13 "	243	1 50
July 13, 1866 .....	14 "	157	2 00
July 20, 1868 .....	15 "	125	50
June 6, 1872.....	17 "	238	70
March 3, 1875 .....	18 "	339	90
August 27, 1894.....	28 "	563	1 10

The present tax, it is seen, is the highest ever imposed, except between 1864 and 1868.

The tax is imposed (R. S. §3248) upon the alcohol in the product. The proof gallon, which is the unit of tax, is defined by R. S. §3249 as "alcoholic liquor which contains one-half its volume of alcohol." The actual tax upon alcohol is, therefore, at twice the rate fixed by the law, or \$2.20 a gallon. If absolute alcohol could be obtained, it would be known to the internal revenue law as 200° proof. At the present rate of tax, as appears by Finding II (Rec. 4), the tax is 900 per cent of the value of commercial alcohol.

Commercial alcohol as known to trade is about 94° alcohol or, in internal revenue parlance, 188° proof.

### Reason for High Taxation.

It was on account of their pernicious effects as a beverage that distilled spirits were originally taxed in Eng-



land in 1729; and such has been the theory of their taxation from that date to the present in that country, as well as from 1862 in the United States. In Dowell's History of Taxation and Taxes in England, stated in the opinion of this court in *Pollock v. Farmers' Loan and Trust Company*, 158 U. S. 601, 630, as "admitted to be the leading authority," it is said (2d Ed. Vol. 4, p. 167):

"In 1729, the habit of drinking spirits had increased to such a degree among the lower class of the people, that the legislature was induced to interfere and attempt to stop the increasing tide of drunkenness. They condemned the constant and excessive use of spirits evident among the lower classes, as 'tending to the destruction of the health of the people, enervating them, and rendering them unfit for useful labour and service.' By intoxication the people were debauched in morals, and driven into all manner of vices and wickedness (2 Geo. II, c. 17); and 'this licentious use of these pernicious liquors' was due to cheap gin and the unrestricted liberty of selling it. In that view, first, a heavy tax was imposed upon gin of all sorts, *i. e.* 'gin, geneva, juniper water, and all other compositions of any other ingredients with brandy, low wines or spirits, by whatsoever name called.' Secondly, all distillers of compounded waters were placed under the supervision of the Excise. Thirdly, an annual license costing 20*l.* was required for all retailers of gin or compounded waters; retailer meaning any person selling less than a gallon at a time. And lastly, the hawking of brandy, strong waters, or other spirits about the streets was totally prohibited."

A recent writer, Frederick C. Howe, in his work entitled "Taxation and Taxes in the United States under the Internal Revenue System," says (p. 136):

"The well-nigh universal experience of foreign states, the more recent history of our own excise, as well as the demands of social, economic, and fiscal considerations, unite in admitting distilled spirits to be a most proper object for taxation."

See also Eldridge on Internal Revenue Laws, pp. 43, 44 ; Wells' Practical Economics, pp. 194, 195, 209, 216, 229.

The tax on alcohol as an intoxicant is in theory justifiable, and in practice probably beneficent. Intoxicating liquors are by large numbers of persons regarded as an unmitigated evil; and by most others as a superfluous luxury. The enormous percentage of the tax to the value of the product taxed is justified upon this ground and upon no other.

### **III. ALCOHOL USED IN THE ARTS.**

#### **Character of Uses.**

So generally is the use of alcohol as a beverage recognized as its chief use that it may fairly be questioned whether it would popularly be recognized that it has many other uses. Comparatively few, except those commercially interested or special students of the subject know the many additional purposes in the industrial arts for which it is used in articles entering into daily consumption. That a considerable quantity may be an important element in the manufacture of the stiff "Derby" hat of every day use is disclosed by the findings in this case, and perhaps so disclosed for the first time to some readers of this brief. Official investigation (see Sen. Rep. 411, 55th Cong. 2d Sess.) shows that it is also used in the manufacture of varnish, pharmaceutical preparations, chemicals, flavoring extracts, perfumery, chewing tobacco, photographic materials, electric insulators, enamelled ironware, fulminate of mercury and smokeless powder.

#### **Beverage Tax not Justifiable on These Articles.**

It will readily be admitted that an internal revenue tax of 900 per cent upon a common constituent of the

domestic manufacture of these articles can not be justified on any recognized principles of taxation. The reason justifying this tax on beverages fails when applied to alcohol used in the arts.

The extremely high percentage of this taxation is the more emphasized by the fact that the average of tariff taxation on articles of foreign manufacture has never been equal to fifty per cent *ad valorem*, even in the acts of 1890 and 1897, avowedly based on the principle of high protection.

### **Legislative Attempts at Freedom.**

Under these conditions it is not surprising that for many years there has been urged upon Congress a removal of the tax on alcohol used in the arts. This was done in 1882 (Congressional Record, Vol. 13, pp. 5325, 5360-5364), when Representative Hewitt of New York, himself widely known as a manufacturer, said (p. 5363):

"According to my observation there is no one article embraced within the tariff or internal revenue system which is of such universal application in the arts as alcohol. My friend from Pennsylvania (Mr. Kelley) very properly said that it was nature's great solvent. Solvent of what? Solvent of the material which must enter into the great chemical industries of this country. And if those industries are to thrive, if they are to be able to enter into competition with similar foreign industries, this barrier must be removed."

In 1886 (Congressional Record, Vol. 17, pp. 341, 394, 582), the movement was renewed. In 1888 the Senate Committee on Finance, on the 4th of October, by its chairman, Mr. Aldrich, submitted the following as a portion of its report on the so-called Mills Bill (Senate Report No. 2332, 50th Congress, 1st Session, reprinted

in Senate Report 760, 53d Congress, 3d Session, Part 1, p. 100):

"The provisions of the substitute which allow the use of alcohol in the industrial arts free from taxation would prove of great benefit to a large number of important manufacturers. Alcohol is used in the production of more than five hundred chemical and pharmaceutical preparations and in many of the mechanical and industrial arts, and its use in all these directions would be largely extended if the onerous tax should be abolished. The heavy tax upon alcohol unnecessarily increases the price of many manufactured products, with no corresponding benefit except the resulting revenue, which is now unnecessary."

The legislation then proposed was for the use of alcohol in the arts, in bond under severe restrictions, without previous payment of tax. That bill, however, failed to become a law.

A proposition similar to that reported in the Mills bill was discussed and rejected as an amendment to the bill which became the act of August 28, 1894, (Cong. Rec. Vol. 26, Part 7, pp. 6935, 6936). The provision finally adopted (§ 61) provides a totally different mode of giving free alcohol in the arts by payment of the tax and a later rebate upon proof of the use of the alcohol.

### **Legislation of Foreign Countries.**

The policy so long urged upon Congress and embodied in § 61 of the act of 1894, had already been adopted in the legislation of Great Britain, Germany, France and other commercial nations. The laws appear in Sen. Rep. 760, parts 1 and 2, 53d Cong. 2d Sess. and in Sen. Rep. 411, 55th Cong. 2d Sess. They show that the policy, once adopted, has always been adhered to, and generally extended. In the latter document appears an official

report of an investigation made in foreign countries of their laws, regulations and practical administration in regard to free alcohol for uses in the arts.

In Great Britain (p. 45) alcohol is allowed free of tax when methylated or denaturalized by being mixed with wood alcohol, acetone, naphtha, or other substance, rendering it unfit for drinking. Under earlier laws, a rebate of tax was made; under existing laws, the alcohol so treated is free of tax from the beginning.

In Germany (p. 55) increasing latitude and freedom have been allowed by amendments, from time to time, of the laws and regulations in regard to the use of alcohol in the arts free of tax, and there is no desire to abrogate the free alcohol laws. "The consumption of alcohol in chemical, pharmaceutical and other manufactories is constantly and largely increasing." Alcohol is made free not only when methylated, for use in the industrial arts, but when pure, for scientific and medicinal purposes, for manufacturers of soap and perfumery, and for other like purposes. The method adopted is to rebate the production tax, but to release the alcohol from payment of the consumption tax.

France (p. 87) allows free alcohol for varnish, insect destroyers, simple and compound ethers, dyes, tannin, various alkaloids, fulminate of mercury, for lighting and heating, for transparent soaps, chloroform, chloral, collodion and liquid rennet. The general denaturalizing agent is methylene, a mixture of methyl alcohol, acetone and pyroligneous impurities. Special agents are allowed for ethers, such as ether itself, bromine, sulphuric acid, sodium and other chemicals; for chloral, chlorine gas; for collodion, ether; for making liquid rennet, the alcohol is diluted with brine, and for lighting and heating, where it is sold in the open market, beside the ordi-

nary methylene, heavy benzine is added and green malachite to color it green.

In Belgium free alcohol is allowed for industrial purposes, including heating and lighting (p. 139). The Minister of Finance determines the process of methylation and the nature and proportion of substances necessary to render the alcohol unsuitable for human consumption (p. 144).

In Switzerland the government has a monopoly of the alcohol trade and sells alcohol for industrial or domestic uses on special terms. The mode of methylation is determined by the authorities (p. 219) and is called either absolute or relative methylation, defined as follows:

"The absolute methylation shall interfere as little as possible with the employment of the methylated alcohol as a combustible, etc. for household purposes.

"In relative methylation the choice of the methylating substance may vary with the scientific or technical uses, or with the special industrial product for which the methylated alcohol is intended."

Freedom from tax on alcohol for industrial purposes is thought so important that the following amendment to the Constitution was adopted on October 25, 1885 (p. 224):

"The Confederation is authorized, by way of legislation, to issue directions relating to the manufacture and sale of distilled liquors. At this legislation those products that either are to be exported or that have undergone a preparation excluding their use as a beverage shall not be subjected to any taxation."

In The Netherlands (p. 225) a liberal methylation law is in force, wood spirits being used.

In Sweden alcohol is free when made unfit for drinking purposes by denaturalization (p. 244). Wood spirits and pyridine bases are the common denaturalizing agents

(p. 245), but in making varnish, turpentine is used; for percussion caps and fulminate of mercury, turpentine or hartshorn oil; for alkaloids, the same; for medicinal extracts, turpentine; for chloroform and other like chemicals, hartshorn oil, and for making tannic and salicylic acids, ethyl ether. Alcohol for vinegar is made free by the use of 3 per cent of acetic acid.

In Norway (p. 263) methyl alcohol and pyridine bases are added (p. 267). For sale in the open market, suitable coloring matter is used and for making varnish, fulminate of mercury and other articles, already mentioned in referring to Sweden, similar provisions obtain.

In Portugal (p. 272) provisions for methylation are in force.

In Austria-Hungary the law is much the same as in Germany. The ingenuity of the chemists of this country has, however, applied to practical purposes a very remarkable agent for identifying the tax-free spirits. When wood spirits are used, phenol phthalein is added. The report says (p. 284):

"The phenol phthalein has the quality that it easily dissolves in alcohol, concentrated, as also diluted, without changing the color of the latter, but that the spirits blended with the same directly take a vivid and intensely red color as soon as natron lye is admixed with them. The coloration thereby affected is such an abundant one that the same remains distinctly noticeable even in such a rare fraction of 1:10,000,000.

"Through the addition of phenol phthalein, therefore, the controlling officials are put in the position, in a simple manner, at all times to prove whether potable spirits have been manufactured from spirits which have been methylated for the common commerce, or are blended or not blended with such spirits."

Special methylates are allowed (p. 290) such as turpentine, animal oil, mineral oil and sulphuric ether, as

adapted to each branch of manufacture. Liberal provisions are made similar to those in force in Germany, allowing alcohol free of tax for medicinal and scientific purposes (p. 293).

It is worthy of note that the progress of each country has been towards greater freedom. In Germany this has reached its maximum, and affords one among many illustrations of the thorough, intelligent and scientific methods which are opening the markets of the world to German manufactures.

This brief review establishes that § 61 of the act of 1894 was the adoption by Congress of a policy of taxation, placing the country in this respect on a level in the markets of the world with the most enlightened commercial nations. It was unfortunate, as well as unlawful, that the Secretary of the Treasury, closing his eyes to the practices of other nations, declined to perform the duties imposed on him in executing the legislative policy.

### **Freedom of Alcohol in the Arts a Logical Element of the Act of 1894.**

The policy of free alcohol in the arts was, indeed, the logical outcome of the principles of the act of 1894. The other provisions, giving free raw materials, reducing the rates of customs duties on manufactured articles and raising the rate of internal revenue tax on alcohol, made this policy not only a logical result but an industrial necessity.

As a raw material of the many industries already detailed, it was entitled to be placed in a position fully as advantageous as imported raw materials. But, of still greater practical importance, the increase of the internal tax on alcohol used in the arts, coupled with the reduction of the tariff tax on imported manufactured articles, would have placed domestic manufactured



articles, using alcohol, in an unfavorable relative position to the foreign articles. Especially would this be true when these were made in a country allowing free alcohol in the arts.

The present case is an instance. By the tariff act of 1890, paragraph 451, a specific duty is imposed on hats of fur equivalent to 55 per cent *ad valorem*. The tariff act of 1894 imposes, by paragraph 335, a duty upon hats of fur of forty per cent *ad valorem*. See Sen. Rep. 698, 53d Cong. 2d Sess. p. 257.

Hence, had Congress increased the tax on domestic alcohol, while reducing the tariff on foreign articles using alcohol, without bringing our own legislation into line with those of other countries allowing free alcohol in the arts, the results would have been of the most detrimental character to American manufacturers of these articles.

While political thinkers are not in accord on the policy of directly encouraging domestic manufactures by discriminating against foreign goods in the imposition of tariff duties, no one contends for discriminations against our own manufacturers in our own markets. Such discrimination would have been the necessary result of the legislation referred to had it not been accompanied by the provisions of § 61 exempting alcohol used by American manufacturers from tax. No American Congress could have contemplated so iniquitous a result of legislation. § 61 of the act conclusively shows that such a result was carefully guarded against in considering the effect of the act as a whole upon American manufactures.

But this is not all. By § 22 of the tariff act of 1894—an extension of § 3019 of the Revised Statutes—it is provided :

“That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall

be allowed on the exportation of such article, a drawback equal in amount to the duties paid on such materials used, less one per centum of such duties."

Under this provision an American manufacturer of goods for export, into which alcohol enters, can use foreign alcohol, and, upon exporting the finished product, secure a drawback of all duties paid on such alcohol, thereby getting his foreign alcohol free of tax. Unless this provision allowing a drawback of the tariff duty on foreign alcohol used in the arts and manufactures is accompanied by a corresponding provision for rebate on domestic alcohol so used, it necessarily follows that an American manufacturer producing such goods for export is driven almost by necessity to import his alcohol for the manufacture of all goods so exported. Congress would not intentionally make such discrimination against the American farmer, the producer of the grain from which alcohol is made, who, of all classes of producers, receives the least direct protection from our tariff laws. Yet this is the necessary result of legislation allowing a drawback on foreign alcohol and none on domestic. At the present time, since the repeal of § 61, a large quantity of foreign alcohol is thus used in the manufacture of goods for export. Drawbacks are allowed by the Treasury on such alcohol. (Synopsis Treasury Decisions, 1894, No. 14,977.)

It was such considerations as these that impelled Congress to make free from taxation by § 61 all domestic alcohol used by manufacturers "in the arts, or in any medicinal or other like compound." That freedom constituted an essential feature of the revenue system established by the act of 1894, and its maintenance was essential to the logical preservation of the system of which it formed a part. The form of the enforcement of this policy, whether by payment and rebate of the tax or by

initial freedom, is immaterial; in either case, the intended policy is executed, freedom of the alcohol from tax is attained.

### **This Section a New Policy of Taxation.**

The investigation of the principle upon which this tax is based, the legislation of foreign countries and the accompanying provisions of the act of 1894, show that § 61 is a general declaration of a new revenue policy, recognizing the principle on which the taxation of distilled spirits is based and consonant with the most enlightened legislation of the commercial world.

### **Free Alcohol in the Arts Illustrated.**

The extent and importance of the question of the use of alcohol in the arts and the effect upon the industries using alcohol for purposes other than as a beverage, are probably better set forth in a letter from David A. Wells, formerly Special Commissioner of the Revenue, to the Chief of the Bureau of Statistics, on October 11, 1887, than elsewhere. This will be found in Sen. Rep. 760, 53d Cong. 3d Sess. part I, pp. 102-104. It is inserted even at the risk of undue extension of this argument, as an appendix at the close of this brief.

## **IV. THE RIGHT FIXED BY STATUTE AND NOT BY REGULATION.**

The language of § 61 is as follows:

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and

exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

### **The Purposes of the Law.**

Reading together the sections of this act relating to distilled spirits, it may be said that Congress had in view two purposes: the first, by § 48, to increase the tax on distilled spirits; the second, by § 61, to make free of tax alcohol used in the arts. They formed part of one system and are to be so construed. These purposes have been recognized by the Court of Claims in its opinion (Rec. 26).

### **The Secretary's Duty.**

To carry out the second of these purposes the Secretary of the Treasury was directed to make regulations. The terms of the act deny any discretion to him as to whether he shall make regulations. The words "regulations to be prescribed" mean "regulations which are to be prescribed," *i. e.* which shall be prescribed.

If, instead of the infinitive form the clause as to regulations had been put into an independent sentence, the mere introduction of the verb required for the completion of the sentence would make the clause read "regulations are to be prescribed by the Secretary of the Treasury." This would, grammatically and logically, be the equivalent of "regulations must be prescribed," or, "regulations shall be prescribed by the Secretary of the Treasury."

His discretion as to the character of the regulations is very broad, but his duty to prescribe regulations of some character is unconditional.

While the Court of Claims does not admit this conten-

tion (Rec. 35), it is equally not denied. The language plainly indicates the legislative will that regulations are to be prescribed. But this will was defeated because the Secretary of the Treasury, for reasons which we shall consider hereafter, declined to prescribe effective regulations.

### **Claimant's Rights Not Affected by Official Failure.**

The claimant contends that the purpose of Congress to relieve him of taxation can not be defeated by the refusal of the Secretary of the Treasury to carry out the law.

The Court of Claims, relying on nothing but a supposed verbal peculiarity in the phraseology of the statute, holds that, without regard to the duty of the Secretary, his failure to prescribe "effective regulations" defeats the claimant's right.

It will be our effort to show that, as the power to tax or not to tax is one peculiarly within the control of the legislative branch of the Government, the principle must be applied, which has uniformly been held by the courts, that, when Congress grants relief from taxation the courts are open to the citizen for redress for executive refusal to execute the legislative will.

### **The Question Settled by Adjudged Cases.**

On this point the case of *Campbell v. United States*, 107 U. S. 407, is in principle identical with the present. The opinion of this court by Mr. Justice Miller is so directly in point that we here quote it in full :

"The fourth section of the act of August 5, 1861, c. 45, reads as follows : 'That from and after the passage of this act there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback equal in amount to the

duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury; *Provided*, that ten per centum on the amount of all drawbacks so allowed shall be retained for the use of the United States by the collectors paying such drawbacks respectively.'

"On the 22nd of January, 1862, the Secretary established such regulations as he deemed appropriate, the first of which is this:

"To entitle the exporter to such allowance of drawback, he must, at least six hours previous to the putting or lading any of the articles intended to be exported by him for benefit of drawback on board any vessel or other conveyance for exportation, lodge with the collector of customs for the district from which such exportation is to be made, an entry setting forth his intention to export such articles, and the marks, numbers, and a particular description of the same, with their quantity and value, and designating the manufacturer thereof, the place where deposited, the name of the vessel or other conveyance in or by which, and the port or place to which the same are intended to be exported, and also describing in such entry the material or materials severally from which he claims the articles to have been manufactured, designating when, where, whence, by whom, and in what vessel or other conveyance the same was or were imported, and specifying the quantity and value thereof used in the manufacture. This entry shall, upon presentation, be verified by the oath or affirmation of the proprietor and the foreman of the manufactory in which such articles were made.'

"Other regulations require the collector and the surveyor to make the necessary examination to ascertain if the articles described in this entry be as stated, and to mark and designate them accordingly, and to verify the weight, gauge, measure, or amount, and to superintend the lading for export, &c.

"All this having been done, and the oath of the exporter and his bond, with condition prescribed by the rules, being given, the collector is to give a certificate of the amount to which the party is entitled as drawback, on which he is to receive the money.

"George W. Campbell and George A. Thayer, survivors of Ludlow D. Campbell, deceased, sued in the Court of Claims for a drawback on account of large amounts of linseed cake made by them out of linseed imported from a foreign country, and which cake they exported to London.

"Their petition was dismissed by that court, on the ground, as stated in their opinion, that it was not a case of which they had jurisdiction.

"The court, however, did entertain jurisdiction of the case; an answer was filed on behalf of the United States denying the allegations of the petition, testimony was taken, and a full and elaborate finding of facts was made, and on this, the court, as a conclusion of law, find that for want of jurisdiction of the subject matter the petition is dismissed.

"This finding of facts shows that in the months of September, October, November, and December, 1870, claimants imported from Calcutta large quantities of linseed, for which they paid the duty of sixteen cents per hundred pounds according to law, which was by them, without intermixture with any other linseed or other material, manufactured into linseed oil and linseed cake, of the latter of which article there was produced therefrom 5,156,585 pounds.

"It was for the exportation of part of this latter product that the drawback is claimed in this suit. As, however, this was done by several shipments at different times, and as the finding of facts is precisely the same in the case of each shipment, except as to date, quantity, and the name of the vessel, we give here verbatim the finding as to the first :

"On the nineteenth day of January, 1871, the claimants and said Ludlow D. Campbell were the owners of and had in their possession 447,712 pounds of linseed cake, being parcel of the aforesaid 5,156,585 pounds, and desiring and intending to export the same from New York to London for the benefit of the drawback authorized by the fourth section of the "Act to provide increased revenue from imports to pay interest on the public debt, and for other purposes," approved August 5, 1861, duly

presented to and lodged with the Collector of Customs for the port of New York, before putting or lading any of the said cake on board any vessel for exportation, an entry of said linseed cake for export by the ship "Sterling Castle," which was accompanied with the certificate and oath required by, and was in all respects in conformity with, the regulations prescribed by the Secretary of the Treasury, in pursuance of the requirement of the fourth section of said act, and the said claimants and the said Ludlow D. Campbell in all respects conformed to such regulations in respect to drawback, which allowance had been by said regulations fixed at seventeen cents per one hundred pounds, and made payable by the United States thirty days after clearance of the vessel by which exportation was made, but the said collector, acting under instructions from the Secretary of the Treasury, given on the fifth day of December, 1870, wholly refused to perform or cause to be performed in any manner any other act than the receipt of said entry prescribed by said regulations to be done, or caused to be done, by a collector of customs under the said fourth section of said act.

" ' Thereafter, in the month of January, 1871, the said 447,712 pounds of linseed cake were shipped by the claimants and said Ludlow D. Campbell, on the said ship "Sterling Castle," which vessel, with said linseed cake on board, cleared at the custom-house at the port of New York for London on the 30th day of January, 1871, and said cake was thereupon exported and carried by said vessel from New York to the port of London, in England, and there discharged and delivered, and no part thereof has been at any time relanded in any port or place within the limits of the United States.'

"The argument of counsel for the United States is, that until the officers of the customs comply with all the regulations of the Secretary of the Treasury, and the collector issues the drawback certificate, the law imposes upon the United States no obligation to pay anything for such drawback; that the law conferred upon the Secretary the right to make the regulations, and the collector the power to make the certificate for payment of drawback, and that the refusal of the collector to perform



the duties imposed upon him preliminary to making his certificate, and then refusing the certificate, totally defeats the claim of the party, who, by the law, is guaranteed a right to his drawback, and who has complied with all that the law requires of him to secure and enforce it. To the same effect is the opinion of the Court of Claims.

"It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the Secretary by regulations, which might be proper to secure the government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable.

"But the regulations in this case are not unreasonable, nor do they interpose any obstacle to the full assertion and adjustment of plaintiffs' right. It is the order of the Secretary of the Treasury forbidding the collector to proceed under these regulations or in any other mode, which is the real obstacle. Is that order a defense to this action? Can the Secretary, by this order, do what he could not do by regulations,—repeal or annul the law? Can he thus defeat the law he was appointed to execute, by making regulations, and then, by ordering his officers not to act under them, and not to act at all, place himself above the law and defy it?

"We think the Court of Claims has jurisdiction of such a claim: 1. Because it is founded on a law of Congress; and, 2. Because the facts found in this case raise an implied contract that the United States will refund to the importer the amount he paid to the government.

"The finding of the court is that, by the regulations, this allowance of drawback had been fixed at seventeen cents per hundred pounds.

"The act of Congress having declared that on exportation there shall be allowed a drawback equal in amount to the duty paid on such material, and the Secretary having established by a regulation that, as regarded the cake resulting from the manufacture of the

linseed into oil and cake, the latter represents at seventeen cents per hundred pounds the duty on the imported seed so converted into cake, there resulted a contract that when exported the government would refund, repay, pay back, this amount as a drawback to the importer. If this be not so, it is because it is impossible to make a contract when the details of its *execution* or *performance* are left to officers who refuse to carry them out.

"So it is equally clear that this claim is founded on the law allowing drawback.

"The Court of Claims makes the mistake of supposing that the claim is founded on the regulations of the Secretary of the Treasury. This view can not be sustained. It is the *law* which gives the right, and the fact that the customs officers refuse to obey these regulations can not defeat a right which the act of Congress gives.

"The second section of the act of Sept. 20, 1850, c. 84, entitled 'An Act to enable the State of Arkansas and other States to reclaim the "Swamp lands" within their limits' declares: 'That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid and transmit the same to the governor of the State, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent the fee-simple to said lands shall vest in the said State.'

"This duty was almost wholly neglected by the Secretary.

"In the case of *Railroad Company v. Smith*, 9 Wall. 95, 99, it was insisted that the failure of the Secretary to act made these lands subject to a grant for railroad purposes of a date subsequent to the swamp-land act. This proposition was thus answered by this court: 'Must the State lose the land, though clearly swamp land, because that officer had neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be de-

feated by that delay \* \* \* Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the State, they therefore pass under a grant from which they are excepted beyond doubt, and this when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from plaintiff's grant,' that is, were granted to the State as swamp lands.

"And in *French v. Fyan*, 93 U. S. 169, 173, the court, reaffirming *Railroad Company v. Smith*, said: 'There was no means, as this court has decided, to compel him (the Secretary) to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty.'

"The application of this reasoning to the present case is too clear to need illustration.

"It is an error to suppose that the officers of customs, including the Secretary, are in regard to this law created a special tribunal to ascertain and decide conclusively upon the right to drawback. Their function is entirely ministerial. They are authorized to pass upon no question essential to the claimant's right so as to conclude him in a court of competent jurisdiction. From the moment he presents his sworn entry, they simply ascertain quantities, identify and mark packages, accept bonds and sureties, and see that the exported article leaves the port in the ship. These and like duties being discharged, it is the collector's duty—a mere ministerial function—to give the certificate of drawback. The amount of it is fixed at seventeen cents per hundred pounds by the regulation; he has nothing to do but to calculate the amount at that rate on the number of pounds shipped. He exercises no judicial or *quasi* judicial function. He concludes nobody's rights, and has no power to do so. The rights which the law gives can not

be defeated by his refusal to act, nor by his decision that no drawback was due.

"Neither the act of Congress, nor any rule of construction known to us, makes the claimant's right, when the facts on which it depends are clearly established, to turn upon the view which the collector, or the Secretary, or both combined, may entertain of the law upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them.

"A suggestion is made that the right to enforce the drawback in the court is affected by the fact that it is a gratuity.

"It has never been supposed that there was a gratuity in all the cases where imports are free of duty. The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country,—articles which are not sold or consumed in the United States. The linseed in this case was bought abroad and imported for the purpose of being manufactured, and the product immediately sent out of the country. The drawback provision was simply a mode of making the linseed so imported and exported without distribution in the country duty free, and we see no gratuity in the case.

"But if it were a free gift, it is not for the officers of the government to defeat the will of Congress on this subject by refusing to execute the law.

"We are of opinion that the facts found by the Court of Claims established the right of appellants to recover a judgment for the exported cake at the rate of seventeen cents per hundred pounds; *and the cause is remanded with directions to enter such a judgment.*"

We have inserted the entire opinion of the Supreme Court on account of the instructive remarks showing that the Secretary of the Treasury is totally without power to defeat an act of Congress conferring rights upon private parties, either by refusal to make regulations, or by making regulations and then refusing to act upon them. The court treats an attempt to annul the law by regulations as

a plainer case than that then before the court, of making regulations and then ordering his officers not to act under them. For it is said (p. 410), "Can the Secretary by this order do what he could not do by regulations—repeal or annul the law?"

The letter of the Secretary of the Treasury, set out in the petition and findings of fact, may properly be regarded as a regulation undertaking to repeal or annul the law. This is the very thing which the Supreme Court treated, almost axiomatically, as a legal impossibility.

Directly in point also is the case of *Morrill v. Jones*, 106 U. S. 466, decided at the same term with the *Campbell* case. This case arose under the following circumstances:

"Section 2505 of the Revised Statutes provides, among other things, that 'Animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free (of duty), upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe.' Article 383 of the Treasury Customs Regulations provides that before a collector admits such animals free he must, among other things, 'be satisfied that the animals are of superior stock, adapted to improving the breed in the United States.'"

The court, however, held that the restriction made by the Treasury Regulations to animals of superior stock was void, and thus commented upon the executive attempt to restrict the scope of the law (p. 467):

"The Secretary of the Treasury can not by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the

body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

If a mere restriction of the scope of an act of Congress was thus held to be beyond the power of the Secretary of the Treasury, it is much more plainly beyond his power to defeat the object of the law by absolutely refusing to make any regulations whatever.

In the recent case of *United States v. American Tobacco Company*, 166 U. S. 468, 475, 476, this court thus expressed, in the opinion by Mr. Justice Peckham, its views as to the office of Departmental regulations under § 3426, Rev. Stat. as amended by § 17 of the act of March 1, 1879, 1 Supp. R. S. 241, 20 Stat. L. 349 :

"While the regulation prescribed by the Commissioner of Internal Revenue would be regarded as proper and appropriate for the purpose of satisfying him of the fact of the destruction of the stamps, yet we think there was a substantial compliance with that regulation on the part of the tobacco company in this case," etc.

"If the object of the regulation were to discover whether the stamps had been insured and whether payment therefor had been made by the insurance company, and if so, to base a refusal to reimburse upon that fact, we think that portion of the regulation was unreasonable, and compliance with the form as provided was unnecessary."

The principle thus established, that if a regulation is unreasonable, the right is complete under the law, without complying with the regulations, is the same as that

here contended for. In either case the right is granted by the law and is not affected by either the erroneous action or the non-action of the officer charged with its enforcement.

In *Balfour v. Sullivan*, 19 Fed. Rep. 578, Judge Sawyer made the following ruling (p. 579):

"Section 9 of the act of Congress of February 8, 1875, 'To amend existing customs and internal revenue laws, and for other purposes,' (Supp. Rev. St. 130), provides that '*grain bags, the manufacture of the United States, when exported, filled with American products, may be returned to the United States free of duty, under such rules and regulations as shall be prescribed by the Secretary of the Treasury.*' There is no exception to these provisions. The *bags*, whatever may be said of the *material*, were 'the manufacture of the United States,' and they were exported *filled with American products*, and being such were entitled under this act to 'be returned to the United States *free of duty.*' It does not appear to me that this explicit language is open to construction. The only exception is that they shall be returned 'under such rules and regulations as shall be prescribed by the Secretary of the Treasury.' The authority of the Secretary only extends to the *modus operandi*—the course to be pursued in identifying and returning the 'grain bags;' and that power does not extend to an imposition of a duty in the face of the provision of the statute that they 'may be returned \* \* \* free of duty.' The statute in no sense authorizes the imposition of a duty, as a part of the rules and regulations to be prescribed by him. The omission to provide for a repayment of the drawback in such cases may be an oversight on the part of Congress. But whether so or not, to require by regulation the collection of the regular duties upon bags manufactured in the United States, because the bags, when exported, paid a 'drawback' for duties on the material of which they were manufactured, is to ingraft an exception on the provisions of the act, authorizing the bags which were 'exported filled with American products,' 'to be returned \* \* \* free of duty,' which

Congress either did not see fit or omitted to adopt. The Secretary of the Treasury was not authorized to make any such exception. *Morrill v. Jones*, 106 U. S. 466; *Merritt v. Welsh*, 104 U. S. 702; *Balfour v. Sullivan*, 8 Sawy. 648; S. C. 17 Fed. Rep. 231."

In *Pascal v. Sullivan*, 21 Fed. Rep. 496, it was held that the Secretary of the Treasury could not make a regulation changing, in the guise of definition, the rates of duty fixed by Congress upon articles which may be lawfully imported into the United States. The court said (pp. 497, 498):

"The only question is whether, under this provision of the statute, the Secretary was authorized to make the regulation, and, being made, whether the determination that the waters are artificial mineral waters, in consequence of the absence of the prescribed certificate, is now conclusive on the rights of the importer. That the Secretary can not impose restrictions not authorized by law, was held in *Morrill v. Jones*, 106 U. S. 466. So, also, in *Balfour v. Sullivan*, 8 Sawy. 648; S. C. 17 Fed. Rep. 231. In *Campbell v. U. S.* 107 U. S. 410, the Supreme Court very clearly intimate that the regulations made by the Secretary, under the assumed authority granted to him, must be *reasonable*, and, if they are unreasonable, that they will be void, and should not be enforced by the courts. Says the court:

"It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported articles on which he had paid duty, had empowered the Secretary, by regulations which might be proper to secure the Government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid, as being altogether unreasonable."

"A regulation may, perhaps, be reasonable and proper, so far as the practical administration of the office of the



collector is concerned, provided the determination made by the collector, in pursuance of such regulation, be not conclusive on the ultimate rights of the importer. In this case, for example, to guard against fraud, and to facilitate the due administration of the customs laws, it may, perhaps, be proper for the Secretary of the Treasury to require the prescribed certificate of the owner or manager of the spring producing the water as the only *prima facie* evidence upon which the collector shall act, thereby putting the importer who declines or fails to furnish the certificate to the inconvenience of correcting in the courts, where the means of ascertaining the truth are more efficient than any in the collector's office, any error resulting from his refusal or neglect to conform to the regulations for the government and convenient administration of the affairs of the collector's office. But whether the Secretary can prescribe rules as to the character and competency of evidence that shall be binding upon the courts, or that shall conclude the rights of the importer, and, in effect, ultimately and conclusively change the rate of duties fixed by Congress upon articles which may be lawfully imported into the United States, is another question. While I am not prepared to say that the regulation in question is not a reasonable one for a proper, convenient, and speedy administration of the collector's office, I do not think it was intended, or, if it had been so intended, that it was in the power of the Secretary, by means of it, to make the action of the collector under it ultimately conclusive upon the rights of the importer, or to thereby, in effect, change the rate of duties prescribed by the act of Congress.

"If such is intended to be the effect, the rule, it seems to me, would be wholly unreasonable and void on that ground. It would empower the collector, in the guise of a rule of evidence, to change the rate of duties established by the acts of Congress. It would empower him to enact, as well as administer, laws."

A question identical in principle with that presented by the present case was decided by the Circuit Court for the Southern District of New York, in the case of *Bar-*

*tram v. United States*, 77 Fed. Rep. 604, under one of the paragraphs of the act of 1894 requiring regulations. Paragraph 387 of this act (2 Supp. R. S. 297; 28 Stat. L. 537), provides for the admission free of duty of "articles the growth, produce, and manufacture of the United States, when returned after having been exported," etc., "but proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury." It was held that a failure to make regulations under this paragraph left nothing to be complied with and made the right of free admission absolute, on proof of the facts required by the statute. Referring to the regulations required by the paragraph, the court said (p. 605):

"None had been made under this paragraph at the time of these importations, and therefore none applicable were then in force. The failure to make them would not cut off nor suspend the right, but would leave none to be complied with."

The correctness of this decision is emphasized by that made in the case of *United States v. Dominici*, 78 Fed. Rep. 334, where, under the corresponding paragraph, 301, of the tariff act of 1890, it was held that if the Secretary of the Treasury prescribed regulations, and those regulations were reasonable, and fairly intended to carry out the provisions of the statute, they must be complied with. The court said (p. 337):

"The reasonableness and propriety of these regulations is not questioned; indeed, it is difficult to see on what ground it could be claimed that they were unreasonable, or contradictory of the provisions of the statute."

And again (p. 338):

"There has been no attempt to defeat the provisions of the statute by an arbitrary refusal to prescribe any

regulations at all, nor by the prescribing regulations which it is impossible to comply with. The rights secured to the importer by the statute are in no wise modified or interfered with or injuriously affected by the regulations, which are nowhere suggested to be contradictory of the statute, or unjust, unfair, or even unreasonable."

A prior decision of this same case of *Dominici v. United States* had been made by the Circuit Court, 72 Fed. Rep. 46, in favor of the importers, on the ground (p. 47) that:

"In this cause there is a finding of the local appraiser and also of the board of general appraisers that in fact these articles are shooks of American manufacture, and the board base their decision sustaining the action of the collector solely upon the ground that the importers have not complied with the regulation of the Secretary of the Treasury. Under the decision alluded to which holds first, that there was no such regulation, and secondly, that if there were it was not necessary to comply with it in the present circumstances, I am of the opinion that the decision of the board must be reversed."

The "decision alluded to" in this opinion is one which had been made in the case of *United States v. Mercadante*, 72 Fed. Rep. 46, where the entire opinion by Judge Wheeler was as follows:

"'Shooks, when returned as barrels,' are free of duty; but proof of identity is to be 'made under general regulations to be prescribed by the Secretary of the Treasury.' These are shooks so returned; but that proof of identity has not been made, for no such regulations appear to have been so prescribed. Such proof appears to have been provided for as a further safeguard of identity, but not as exclusive. The fact of identity has been made to appear, and it is not disputed. Nothing more could be made to appear by any proof, however prescribed. The failure to prescribe leaves the fact without further requirement to have its effect. Judgment reversed."

While it is true that this judgment seems to have been reversed by the Court of Appeals, yet that reversal was thus explained by the Circuit Court in the *Dominici* case, 72 Fed. Rep. 47 :

"As I understand it, the Circuit Court of Appeals either reversed the decision of the Circuit Court or dismissed the appeal on the ground that upon the record before them there was no evidence to sustain the finding that 'the fact of identity has been made to appear and is not disputed.' If this be true, it seems to me that the decision of the Circuit Court upon the question in controversy should be followed here. The court decides two propositions, first, that there is no regulation of the Secretary of the Treasury applicable to shooks; and secondly, that it sufficiently appeared from the report of the appraiser, and from the return of the Board of General Appraisers also, that the shooks were of American manufacture, and therefore entitled to free entry and that the proof required by the regulation, even if the regulation were applicable to shooks, was only an additional safeguard and not conclusive."

The general principle to be deduced from all the cases is that regulations under revenue statutes, where reasonable and justified by the statute, are to be followed by the courts; but where the officer either prescribes no regulations, or unreasonable regulations, the courts will enforce the rights granted by Congress according to the purpose declared by the statute.

The following remarks of the United States Circuit Court for the District of Idaho (*Anchor v. Howe*, 50 Fed. Rep. 367, 368) have peculiar force in this connection :

"Under this section the validity of all departmental regulations which are appropriate, and within the limitations of the law, can not be doubted. This, however, is not a grant of power to legislate; to add to the law; to render its enforcement difficult; to burden the proceedings under it with unnecessary expense or hardship;

or to incumber them with onerous and technical conditions. It is designed that the permitted regulations shall simplify and explain, not embarrass, the administration of the law; and certainly they must not only be appropriate, but they must be reasonable, and within the limitations and intent of the statute. \* \* \*

"I am unwilling to say that this and all the departmental regulations, regardless of their encroachment upon or variation from the law, and the needless expense, inconvenience, and hardship which they may entail beyond those which would result by following only the provisions of the law itself, shall be literally and technically construed and enforced. Such a rule would not be conducive to the ends of justice. When they must be followed, and when they may be disregarded, may not be easy to define by any general rule; but in all cases they must be appropriate, and within the limitations of the statute in the enforcement of which they are designed to aid, and which they can not supplant. It has frequently been held by the Supreme and other United States courts that regulations in conflict with the law are invalid; those which enlarge its requirements, though not in exact conflict with or contradiction of it, should be likewise regarded. If this rule is not clearly within the former, it is within the latter class."

Chief Justice Marshall (*United States v. Mann*, 2 Brock. 1) held, in a case decided by him in the Circuit Court, that rules of the Treasury Department going to an absolute denial of justice should be disregarded by the courts.

In the same line of argument, the United States District Court for the Southern District of Alabama (*United States v. Bedgood*, 49 Fed. Rep. 54, 58) said:

"But, in my opinion, no rule or regulation can become or have the force of law. Congress can not, if it would, confer law-making power on the Commissioner or Secretary."

It is seen upon analysis that these cases group themselves into three classes (1) where regulations were

made and not executed, (2) where unreasonable regulations were made, and (3) where no regulations were made. In all these cases alike the same rule was declared, that the right of the citizen rested on the law and not on the regulations, and that the non-action or wrong action of the executive officer could not deprive the citizen of his rights so granted. Most of these cases recognized the correlative principle that, if reasonable regulations had been made and executed, no right could have been asserted without complying with them.

The position of the claimant in this case was forcibly put by Judge Sawyer in the Circuit Court for the Northern District of California in *Siegfried v. Phelps*, 40 Fed. Rep. 660, as follows :

"I do not think the Secretary of the Treasury is authorized by the statute to put any burdens upon commerce, in addition to those imposed by the statute itself. He is authorized to make regulations, 'not inconsistent with law'—to regulate the imposition, and enforcement of the burdens provided for by law, but not to impose others. Burdens imposed upon commerce in addition to those imposed by statute would be 'inconsistent with law,' and unauthorized. See *Balfour v. Sullivan*, 8 Sawy. 649, 17 Fed. Rep. 231, and cases cited; *Merritt v. Welsh*, 104 U. S. 695-700; *Morrill v. Jones*, 106 U. S. 466."

And this court has said (*Merritt v. Welsh*, 104 U. S. 694, 702):

"Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, 'Where law ends, tyranny begins.'"

### **The Principle Illustrated by the Converse.**

It illustrates this principle to suppose that the Secretary of the Treasury had made regulations, as contem-

plated by the act, and that the claimant herein, in compliance with those regulations, had asserted a claim for a rebate of the tax, and that the same had been paid him. This would undoubtedly be a lawful exercise of power on the part of the Secretary; and the money could under those circumstances unquestionably be lawfully received and retained by the claimant. To assert, however, that the mere failure of the Secretary to make regulations has prevented the assertion of a claim, which would otherwise be valid and proper, would be to say that the regulations of the Secretary could absolutely create a right to take money from the Treasury. The arbitrary will of the Secretary, if such a position were sound, could create a liability on the part of the Government to pay out public money for which there would, in the absence of regulations, be no liability whatever. "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 370.

### **The Right Judicially Enforceable.**

There is a distinction between statutes which impose upon public officers duties to be performed for the benefit of some particular person or class, and those which concern only the general public, where the benefits of their enforcement are only incidentally enjoyed by particular individuals. This distinction is stated by the Supreme Court of New York in *Strong v. Campbell*, 11 Barb. 135, 138, by Judge Johnson:

"Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that

he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting by its performance, is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action."

An example of the former class may be found in the numerous suits brought in the Court of Claims for salaries, fees, or emoluments of public officers. For instance in the cases of letter carriers, this court said that the statute giving them extra pay for overtime "was manifestly one for the benefit of the carriers." (*United States v. Post*, 148 U. S. 124, 133.)

An example of the latter is the case of a bidder for a public contract, who acquires no rights before acceptance, even though his bid be the lowest (*Colorado Paving Company v. Murphy*, 78 Fed. Rep. 28); or the old eight-hour law of 1868, R. S. § 3738, which, as it conferred no right to extra pay upon those covered by its provisions, was held to be merely directory from the Government to its officers, constituting "a matter between the principal and his agent, in which a third party has no interest." (*United States v. Martin*, 94 U. S. 400, 404.)

The statute now before the court is a strong instance of the former class, providing, as it does, a payment from the Treasury to a person defined, upon the performance of an act. As the claimant has shown that he has used alcohol in the arts and is within the grant of the statute, this case falls within that class of cases as to which the Court of Claims recently said (*Foster v. United States*, 32 C. Cls. 170, 186):

"Where Congress pledge the faith of the United States in consideration of a person doing some act, such as that in the drawback cases, or in the sugar-bounty cases,



presenting thereby an obligation in the nature of an implied contract, the action of the Secretary of the Treasury, or of the revenue officers, is not conclusive, and an action will lie upon the statutory obligation of the Government. (*Campbell's Case*, 107 U. S. 407; *Glynn's Case*, ante, p. 82; *United States v. Realty Co.* 163 U. S. 427; *Swift's Case*, 105 *Id.* 691; *Swift's Case*, 111 *Id.* 22."

### **The Right Confirmed by Analogous Provisions of the Act.**

Section 61 is not anomalous in requiring administrative regulations for its due enforcement. If the Secretary of the Treasury used his own judgment, as he did in this case, as to the enforcement of every law under which regulations are required to be made by him, and no judicial redress were permitted, the will of Congress expressed in legislation would be abundantly thwarted.

This would be most liberally exhibited by a comprehensive scrutiny of the entire body of existing statutes governing his duties; but it is sufficient to confine the examination simply to this statute. In thirty-nine other places, it authorizes regulations by the Secretary of the Treasury for various purposes connected with the customs and internal revenue laws. These are as follows:

Sugar, par. 182½, 2 Supp. R. S. p. 279,

the importer may be relieved from additional duty "under such regulations as the Secretary of the Treasury may prescribe."

Tobacco, par. 185, p. 280,

entry not to be made, except under regulations to be prescribed by Secretary.

Wines, par. 244, p. 285,

percentage of alcohol to be determined in such manner as the Secretary of the Treasury shall by regulation prescribe.

- Animals for breeding purposes, free list, par. 373, p. 297,  
 Secretary may prescribe regulations for enforcing  
 limitations to registered stock.
- Cattle, &c., par. 373, p. 297,  
 may be brought from pasture free of duty under  
 regulations to be prescribed by Secretary.
- Animals for exhibition, par. 374, p. 297,  
 admitted free, but a bond shall be given in ac-  
 cordance with regulations prescribed by the  
 Secretary.
- Emigrants' teams, par. 374, p. 297,  
 free under such regulations as the Secretary may  
 prescribe.
- Casks and other articles returned from export, par. 387,  
 p. 297,  
 proof of identity to be made under general regu-  
 lations to be prescribed by Secretary.
- Books, &c. for use of schools, libraries, &c. par. 413, p.  
 299,  
 subject to such regulations as the Secretary shall  
 prescribe.
- Indian goods, par. 582, p. 303,  
 free under such regulations as the Secretary may  
 prescribe.
- Theatrical scenery, &c. par. 596, p. 304,  
 admitted free of duty under such regulations as  
 the Secretary may prescribe.
- Works of art, par. 686, p. 307,  
 exemption subject to such regulations as the Sec-  
 retary may prescribe.
- Works of art, &c. par. 687, p. 307,  
 imported for encouragement of science, art or  
 industry free under such regulations as the Sec-  
 retary shall prescribe.

Works of art, par. 688, p. 308,

bond for payment of duties under such regulations as the Secretary may prescribe.

Trade-marks, §6, p. 308,

to be recorded in books under such regulations as the Secretary shall prescribe.

Materials for ship building, §7, p. 309,

may be imported in bond under such regulations as the Secretary may prescribe.

Articles for repair of American vessels, §8, p. 309,

to be withdrawn from bonded warehouses free under such regulations as the Secretary may prescribe.

Articles manufactured of imported materials, §9, p. 309, shall be manufactured in bonded warehouses under such regulations as the Secretary may prescribe.

manufacturer to give bond for observance of such regulations as shall be prescribed by the Secretary.

materials used may, under the regulations of the Secretary, be conveyed into bonded warehouse.

articles may be withdrawn under such regulations as the Secretary may prescribe.

Machinery for repair, §13, p. 311,

Secretary directed to prescribe rules and regulations to protect against fraud.

Importation of neat cattle, §17, p. 312,

made duty of the Secretary to make all necessary orders and regulations to carry into effect.

Smelting works, §21, p. 312,

may be designated as bonded warehouses under such regulations as Secretary may prescribe.

ores may be removed under such regulations as the Secretary may prescribe.

- refined metal may be removed under such regulations as the Secretary may prescribe.
- Drawback on imported material, § 22, p. 313,  
facts to be ascertained and drawback paid under such regulations as the Secretary shall prescribe.
- Articles made by convict labor, § 24, p. 314,  
Secretary authorized to prescribe necessary regulations.
- Imported cigars, § 26, p. 314,  
Secretary authorized to make all necessary regulations.
- Income tax, § 34, p. 320,  
annual tax returned, according to regulations to be prescribed by Commissioner and Secretary.
- Playing cards, § 38, p. 323,  
regulations as to dies and adhesive stamps by Commissioner and Secretary.
- § 43, p. 324,  
may be exported free of tax under such regulations as Commissioner and Secretary may prescribe.
- Distilled spirits, § 49, p. 326,  
distiller may execute an annual bond under such regulations as Commissioner and Secretary shall prescribe.
- Bonded warehouses, § 51, p. 328,  
to be under such regulations as the Commissioner and Secretary may prescribe.
- Spirits removed to general bonded warehouse, § 54, p. 328,  
may be deposited under such regulations as shall be prescribed by Commissioner and Secretary.
- Transporting from one bonded warehouse to another, § 55, p. 328,  
to be under such regulations as Commissioner and

Secretary may prescribe.

bonds to be renewed at such times as Commissioner may by regulations require.

Alcohol in the arts, § 61, p 330,

manufacturer may use under regulations to be prescribed by Secretary.

Packages of rectified spirits, § 66, p. 331,

gauged, marked, etc., as the Commissioner and Secretary may by regulations prescribe.

Manufactured tobacco, § 69, p. 332,

to be put up in such packages as the Commissioner and Secretary shall prescribe.

The terms of the statute vary in these different provisions; but in general, the law either expressly declares, as in § 61, or implies, a positive duty on the part of the Secretary to make regulations. When these are examined, it will be seen that there is no substantial difference between the duty of the Secretary to make regulations under the other provisions and under that in § 61, except that in some of the others the word "may" is used instead of the more mandatory form in § 61.

The means of enforcement of the revenue laws are thus seen to be largely under executive regulation and the inference must be drawn that Congress does not intend, in giving direction to the Secretary to make regulations, that he shall first determine whether adequate regulations can be made or that the rights granted by the law shall be dependent upon his will. Otherwise he might make void the remaining thirty-nine provisions of the statute, as well as this fortieth provision as to which he declined to take action. He had no condition of fact to ascertain. He was directed to perform a duty and this he refused.

It was under a provision similar to that contained in

paragraph 373 of the free list of this act that this court in the case of *Morrill v. Jones*, 106 U. S. 466, declared that "all the Secretary of the Treasury can do is to regulate the mode of proceeding to carry into effect what Congress has enacted." Congress subsequently carried into law, in paragraph 373 of this same act, the very regulation of the Secretary of the Treasury which this court declared void in that case, just as Congress has since by the act of June 3, 1896 (2 Supp. R. S. 492; 29 Stat. L. 195), repealed § 61 of the act of August 28, 1894. But while that law was in force the Secretary had but one duty,—to obey the expressed will of Congress.

It is safe to say that in not a single other instance cited from the statute, has the officer charged with making regulations failed to prescribe complete regulations for the enforcement of the law, except in this case. The surmise can not be avoided that the true reason for not enforcing § 61 lay not in the difficulty, much less the impossibility, of framing regulations,—not in the absence of appropriations for their enforcement,—but in the desire of the Secretary of the Treasury to secure for a depleted treasury every possible dollar of revenue. However creditable such a desire might under some circumstances be, or with how much force he might properly have urged such considerations upon Congress, it was surely in no legal sense justified when placed in opposition to the plain requirements of the statute.

### **The Right Illustrated by Later Taxation.**

It is an interesting fact that two classes of users of alcohol, perfumers and makers of medicines, who were given alcohol free of tax by § 61 of the act of 1894 are subjected to a stamp tax by the War Revenue Act of June 13, 1898, (Schedule B, 30 Stat. L. 462, 463) and are now paying both the tax on the alcohol

used and the stamp tax. It is an instructive reflection that, whatever the will of Congress as to their taxation, they have been constantly taxed because of the will of the Secretary of the Treasury. By the act of 1894, Congress said, "Do not tax," but they continued to pay tax because the Secretary of the Treasury declined to execute the legislative will. By the act of 1898, Congress said, "Tax," and, the Secretary of the Treasury executing the legislative will, they are taxed. But what if the Secretary had again in 1898, disagreed with Congress and refused to execute the law? Would they have gone untaxed? Would not the United States, when more zealous officers claimed the tax, have had a judicial forum for redress? None the less is one to be found here for the claimant in this case.

We are not left to conjecture as to the views of this court on the legal consequences of the case supposed,—the failure of an officer of the Government to make regulations for the assessment or collection of a tax.

In *Dollar Savings Bank v. United States*, 19 Wall. 227, the law imposed a tax of five per cent on the earnings of certain banks, and provided for the assessment and collection of the tax by certain steps to be taken by the officers of internal revenue. No such steps were taken, the Commissioner of Internal Revenue in office at the time being of opinion that the bank was not liable to the tax. A subsequent Commissioner arrived at a different conclusion and, without making any formal assessment, had an action of debt instituted for the recovery of the tax. This court held that no assessment was a pre-requisite to liability, and said (pp. 240, 241):

"No other assessment than that made by the statute was necessary to determine the extent of the bank's liability. An assessment is only determining the value of the thing taxed, and the amount of the tax required of

each individual. It may be made by designated officers or by the law itself. In the present case the statute required every savings bank to pay a tax of five per cent on all undistributed earnings made, or added during the year to their contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank, and without more it made the bank a debtor."

The operation of the taxing power of the United States upon the individual citizen is of the most direct character. Not only does the Constitution itself jealously guard the legislative power over taxation, but, as held in the decision just cited, all the revenue statutes of the United States are to be interpreted as acting directly and personally upon the citizen.

While the mistakes, laxity, or dishonesty of government officers may in actual practice result in a loss of revenue to the Government, no such result follows as a matter of law; and the tax remains no matter how negligent the revenue officers may be in taking the regular steps for its assessment and collection.

If the alcohol which forms the subject of the present suit had, through the negligence or connivance of officers of the Government evaded taxation at the time it was produced, this court would sustain an action for its recovery, even though not a single requirement of law or regulation had been observed by the officers of the Government. Similarly in this case, which involves the taxing power from the opposite point of view, the statute itself creates the freedom from tax; and the failure of the officers of the Government to take the necessary steps for ascertaining that freedom can constitute no bar to the direct relation which the statute itself has established between the manufacturer and the Government.

Under § 25 of the War Revenue Act of June 13, 1898,



(30 Stat. L. 457) the Commissioner of Internal Revenue is required to prepare suitable stamps for the payment of taxes there prescribed; but it has never been suggested that manufacturers who were unable to secure stamps, as was the case with many, shortly after July 1st, 1898, when the act went into effect, would be excused from payment of tax. On the contrary they were obliged to keep accounts and pay their taxes without regard to the failure of the Commissioner of Internal Revenue to do the acts required of him by law.

The only logical determination in all cases is that the judiciary shall enforce the laws decreed by Congress, whether executive officers be lax or overzealous in their execution.

### **The Objections of the Court of Claims.**

The opinion of the Court of Claims is learned and elaborate, yet its gist is found in a very few words, giving the determination of the Court on the one point upon which the case is rested. This is as follows (Rec. 34, 35):

"The grant in the statute under consideration is the right to use alcohol 'under regulations to be prescribed by the Secretary of the Treasury,' and when so used it is to be exempted from taxation by a rebate or repayment of the amount of tax paid by the distiller. There can be no vested right in the manufacturer in the exemption of alcohol used by him unless it is used in pursuance to regulations prescribed by the Secretary of the Treasury, for the reason that the grant to him provides that he 'may use the same under regulations to be prescribed.' The prescription of the regulations by the Secretary forms a most essential part of the grant, and without the condition upon which the manufacturer is to have the exemption the grant fails. It may have been the duty of the Secretary to prescribe regulations (of that we express no opinion), but his failure to do so will not supply a necessary and essential element in the cause of the claimant. If the regulations 'to be prescribed by the Secretary of

the 'Treasury' form a part of the affirmative right of the claimant to the rebate, and the grant embodies as one of its essential elements such regulations, the want of such regulations can not be supplied by the failure of the Secretary to prescribe regulations."

Careful search fails to show that any of the previous reasoning of the opinion has any necessary logical relation to this conclusion. It is an expression of unreasoned opinion. Its force must rest upon the authority of the distinguished judges who concur in it and not upon its resultance from previous reasoning. Many matters are discussed in the opinion, pertinent to the case but not affecting the ground stated upon which the conclusion rests.

### **The Phraseology of the Section.**

It is at once seen that this is a ruling based purely on the peculiarities in the phraseology of the act which the Court of Claims declares that it has discovered and is inconsistent with the second of the two purposes of the act stated by the court (Rec. 26)

"to favor the manufacturer by a rebate and repayment of the tax on all alcohol used by him in the course of his trade and business."

### **The Right Perfect on Claimant's Compliance with the Statute.**

The result to which the Court of Claims arrived in its construction of this section involves a confusion between the duties which it imposes upon the manufacturer and those which it imposes upon the Government. Its requirements may be divided into five :

1. The manufacturer finding it necessary to use alcohol in the arts may use the same.

2. Regulations for such use are to be prescribed by the Secretary of the Treasury.

3. The collector of internal revenue for the proper district is to be satisfied of compliance with the regulations and the use of the alcohol.

4. The stamps showing payment of tax are to be exhibited and delivered up.

5. A rebate or repayment of the tax is to be made from the Treasury.

It is only the first and fourth of these requirements which are imposed upon the manufacturer, at least in the first instance. He must use alcohol for the purposes pointed out in the act, and this is the only condition imposed upon him in order to originate a valid claim against the Government. The fourth requirement, exhibiting and delivering up the stamps, must also be performed by the manufacturer. It goes, however, to the evidence of the claim, rather than to its validity. But the second and third are requirements made upon the Government itself.

"The Government is an abstract entity, which has no hand to write or mouth to speak. \* \* \* It speaks and acts only through agents, or more properly, officers." *The Floyd Acceptances*, 7 Wall. 666, 676.

A default, therefore, of officers of the Government in the performance of something which the Government has taken upon itself to do is the default of the Government. True, the requirement as to regulations involves obedience to those regulations on the part of the manufacturer as a condition of his enjoying the benefit of the statute, after they have once been prescribed; and to that extent the second requirement is a requirement upon the manufacturer as well as upon the Government. The initiative, however, is upon the Government; and until

it, by the designated officer, has prescribed the regulations there is nothing to be performed by the manufacturer under that clause of the statute.

The same may be said of the third requirement. The duty is doubtless imposed upon the manufacturer of producing evidence to satisfy the collector of internal revenue. But, if the collector declines in advance to consider the evidence, there is no breach on the part of the manufacturer of any condition imposed upon him. The default in failing to take cognizance of the evidence is that of the Government, through the officer upon whom that duty is imposed. As little can the Government plead in bar of its obligations under the statute a non-compliance with the statutory requirements by its own officers, upon whom alone they are imposed, as it could plead the default of the Treasurer of the United States if he should refuse to comply with the fifth requirement, to pay the rebate from the Treasury, after the four preceding requirements had been complied with.

In no case, it is believed, has it ever been held that where by statute a promise was held out to a citizen conditional upon the performance by him of certain acts the Government can, in bar of a suit by him upon such promise and the full performance of the conditions, plead the non-performance by officers of the Government of requirements imposed upon them by the same statute. Yet, in the present case the defense of the Government must rest upon defaults of its own officers in the performance of the duties imposed upon them by this statute; for a performance by the claimant of every duty imposed upon him as a condition for obtaining the benefits of the statute has been fully established. That such a plea, of non-compliance by the Government with its own laws, can be set up in bar of the rights of the citi-

zen has been judicially denied in the numerous decisions hereinbefore referred to.

There is nothing in the phraseology of the present statute which in any degree takes it out of the rule thus laid down, or justifies the construction adopted by the court below, which in effect treats the absence of the regulations required by the statute as a non-compliance by manufacturer with the condition imposed upon him by the law.

### **The Phraseology not Different from Other Statutes Considered in Adjudged Cases.**

The principle in all the acts construed in the decisions cited is the same as here. The thirty-nine other grants of authority to the Secretary of the Treasury in the same act can not be differentiated in substance. In every one the purpose of Congress is declared in the law; the Secretary is to determine the form and manner by which the end sought by Congress is to be ascertained. The words of the opinion in the *Campbell* case already quoted in full, are of direct application here (107 U. S. 413):

“Neither the act of Congress, nor any rule of construction known to us, makes the claimant's right, when the facts on which it depends are clearly established, to turn upon the view which the collector, or the Secretary, or both combined, may entertain of the law upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them.”

Some strong reason must be shown why this provision should be held to intend something so different from all the others.

It can no more be said that the right to a rebate is here dependent upon the existence of regulations by the Secre-

tary than freedom from taxation was similarly conditioned in the statute considered in *Morrill v. Jones*, 106 U. S. 466, which provided that certain animals should be admitted free of duty "upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he may prescribe." The language considered in that case was, indeed, more nearly a grant of discretionary power in its use of the word "may" than is § 61 of the act of 1894, in using the more peremptory form of expression "to be prescribed," and the proof was in direct terms required to be "satisfactory to the Secretary." Yet this court held that no discretionary power was conferred upon the Secretary of the Treasury to restrict the class of animals named in the preceding part of the section, but that the regulation was void so far as it attempted to take away any right to import free of duty the class of animals named by the statute itself.

The language used in the statutes construed by the various Federal courts, already cited, required the proofs to be "under regulations." This is, indeed, exactly what is here required. The law prescribes the conditions of manufacture entitling to a rebate,—a "necessary" use "in the arts or in medicinal or other like compounds"; the amount of the rebate,— "the tax so paid," as shown by the stamps; and the essential evidence,— "exhibiting and delivering up the stamps." All that the Secretary could regulate is the mode of creating and preserving the evidence of the use of the alcohol. This not having been done by him the claimant has secured a determination by another, a judicial, tribunal of the very facts which the law directed the Secretary to ascertain by his regulations.

It has been said that in the case of *Campbell v. United States*, 107 U. S. 407, regulations had been made, but the officers of the Treasury refused to enforce them. The

distinction is not treated in the opinion as important. But even this can not be said of the case of *Railroad Company v. Smith*, 9 Wall. 95, quoted by this court in its opinion in the *Campbell* case (*ante*, p. 24). It had there been made the duty of the Secretary of the Interior to certify swamp and overflowed lands granted by act of Congress to the several States. The Secretary of the Interior had wholly failed to perform his duty under that act, and could doubtless have pleaded inadequacy of appropriations. This court, however, held that since the right had once been granted by act of Congress, the failure of an officer of the government directed to take proceedings to make the grant effective did not defeat the grant, but the party claiming its benefits might bring his case within the terms of the law by other evidence.

This brings the present case within the precise terms of the decision in that case. It is, indeed, stronger. The provision of the act in question in that case (9 Wall. 90), was "that it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State." This was far more explicit in vesting a duty in the Secretary of the Interior than is the present act in defining the duties of the officers of the Treasury, yet it was held by the Supreme Court that a failure of the Secretary of the Interior, although due to the fact that he "had no satisfactory evidence under his control to enable him to make out these lists" (9 Wall. 100), could not be pleaded in bar of the direct grant made by the statute. The decision is the more striking from the fact that the statute provided that on the patent of the Secretary of the Interior "the fee simple to said lands shall vest in said State." Yet the Supreme Court held that the fee simple vested under the statute, without a patent,

when the Secretary refused to perform the duties required of him by the statute.

In *French v. Fyan* (93 U. S. 169) also cited in *Campbell v. United States*, this court held that where the Secretary had acted, the court would not review his action. It elaborated the meaning of the opinion and decision in the earlier case, saying (p. 173):

"The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selection or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act. The court said, 'The matter to be shown is one of observation and examination; and whether arising before the secretary, whose duty it was primarily to decide it, or before the court whose duty it became, because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.'"

This makes very clear the immediate analogy between the case of *Railroad Company v. Smith* and the pending case.

It is a notable feature of the opinion of the Court of Claims that every case cited in it, on the subject of executive regulations under a statute, is in opposition to the theory upon which its decision is based. In no case has a judicial decision permitted a statute to be nullified by the failure of an executive officer to make regulations required of him for its execution. The Court of Claims, after citing six decisions to the contrary, proceeds to hold that there is a verbal difference between this and all other judicially construed statutes, demanding a different rule from any before applied. Surely the language of this act is not so unprecedented. Can a judgment be right, when founded on the idea that the case it decides is isolated, to be decided on different principles from any



that have governed the judicial determination of all prior cases?

The Court of Claims (Rec. 30, 34) attempts to point out a verbal difference between the language of this statute and the terms considered in *Campbell v. The United States*, *Morrill v. Jones*, and other cases, but makes no effort to point out any difference in the object and purpose of the regulations. The purpose of the regulations is the same in all these cases—the ascertainment of the quantity and the verification of the identity of the articles in question. The object is not the regulation of the manufacture, as the Government has no interest in this. When the legislative purpose is to take off the tax from alcohol used in manufactures and medicines, and the regulations are simply designed to ascertain the quantity so used, what reason can there be in assigning to such regulations an office of a more essential character than attributed to other regulations for a similar purpose under former statutes? A difference in two cases, to take the later one out of the rule of *stare decisis*, should not be a mere verbal difference in the language of the statutes but a substantial difference in principle, otherwise the judgment in the first case should form a precedent for that in the second. And this is particularly so where there has been, not one decision on a single statute, or even a series of decisions on the same language in different statutes, but a number of decisions on statutes varying in language, though, as the courts have held, similar in purpose.

An interpretation is always to be preferred by which an act is to be made effective. "*Interpretatio fienda est ut res magis valeat quam pereat.*" The interpretation by the court below makes the act wholly ineffective, and that by reason of executive disobedience to a plain legislative command.

## **V. CONSTITUTIONAL PRINCIPLES OF TAXATION INVOLVED.**

There is another ground for the claimant's position that the rights granted him by law and denied by executive action can be secured by judicial relief.

### **An Exercise of the Taxing Power.**

The act of August 28, 1894, is a law for raising revenue, an exercise of the taxing power. Sections 48, imposing a tax on distilled spirits, and 61, freeing alcohol used in the arts, are parts of the system.

### **The Taxing Power Exclusively in Congress.**

The taxing power, by the written Constitution of this country, as by the unwritten Constitution of England, rests exclusively with the legislative authority. Since the days of Charles I no English sovereign has ventured to impose taxes without the consent of the nation in Parliament assembled. The story of English and American liberty is the history of the taxing power.

Had Congress directly provided that all alcohol produced for, and used by, manufacturers in the arts, or in any medicinal or other like compound, should be wholly free from tax, it would never be contended that the Secretary of the Treasury could, by making, or refusing to make, any regulations, impose a tax upon alcohol thus freed from tax.

But the legislation now before the court is in its purpose identical with that supposed, and merely differs in the mode of carrying out that purpose. Its object, as conceded by the Court of Claims (Rec. 26), was to make alcohol used in the arts free from internal revenue taxation. As a means to that end the tax is first paid and then refunded. The regulations required to be prescribed are a

mere step on the part of the Government in carrying out the design of the law. A failure to make such regulations, so far from absolving the Government from the obligation imposed upon it by the law to refund the tax, only brings into the case an element of violation by the Government of its own contract.

In the *Campbell* case (*ante*, p. 19), this court took this view of the drawback law, and says that the purpose of this provision is to make such imports duty free.

The Secretary of the Treasury himself evidently adopted the same view, notwithstanding his failure to provide regulations; for in an official communication he describes this section as "The provision of the act of 1894 *exempting from taxation* alcohol used in the arts and for medicinal purposes." Senate Ex. Doc. No. 34, 53d Congress, 3d Session.

### **Limitation on Executive Power over Taxation.**

The extent to which Congress may grant discretionary powers to executive officers in matters of taxation is clearly illustrated by the recent case of *Field v. Clark*, 143 U. S. 649. In that case the constitutionality of the tariff act of 1890 was assailed on the ground, among others (p. 651):

"That section 3 of said act was unconstitutional and void, in that it delegates to the President the power of laying taxes and duties, which power, by §§ 1 and 8 of article I of the Constitution, is vested in Congress."

The section in question consisted of the famous reciprocity clause of that act and is as follows (1 Supp. R. S. 856; 26 Stat. L. 612):

"That with a view to secure reciprocal trade with countries producing the following articles, and for this

purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the Government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country as follows, namely: "

The court sustained the constitutionality of this feature of the act, solely upon the ground that the power vested in the President was merely that of ascertaining certain facts in regard to the revenue regulations of foreign countries, and that the policy to be carried out was throughout that of Congress alone—the power exercised by the President being simply executive.

The following remarks (pp. 692, 693) plainly set forth the distinction drawn by the court between power to legislate and power to execute the legislation of Congress:

"That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses,

coffee, tea and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, 'he may deem,' in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it can not be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event

upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed."

Even this moderate view of the powers which Congress might constitutionally vest in the President was taken by a majority of the court only. The Chief Justice and one of the associate justices dissented, on the ground that the section in question did invest the President with legislative power over the revenues in violation of the constitutional grant of power to Congress.

There can be found no likeness between § 3 of the act of 1890 and § 61 of the act of 1894.

The power of removing certain articles from the free to the dutiable list was in the act of 1890 expressly conditioned upon the ascertainment by the President of the existence of unequal and unreasonable regulations by foreign countries. It was upon the sole ground that the President was merely authorized to ascertain certain facts as to the legislation of foreign countries, and upon the declaration of such an ascertainment the articles named in the act were to become subject to duty, that the court upheld the legislation.

There was no intimation whatever in § 61 of the act of 1894 of any intention on the part of the legislature to vest in the Secretary of the Treasury a power to ascertain whether adequate regulations could be framed or not. The use of the alcohol is to be "under regulations to be prescribed by the Secretary of the Treasury," not "if the Secretary of the Treasury shall prescribe regulations,"—not, "if the Secretary of the Treasury shall ascertain whether adequate regulations for the protection of the

revenue can be framed," but "under regulations *to be* prescribed," that is, which the Secretary of the Treasury shall prescribe.

Any construction of this legislation which would in effect leave it discretionary with the Secretary of the Treasury to tax, or not to tax, alcohol used in the arts and manufactures would render the section unconstitutional and void.

By article one, § 8, of the Constitution, "The Congress shall have power to lay and collect taxes, duties, imposts and excises," etc. Under this provision the power of taxation must be exercised directly by Congress itself, and can not be delegated to any other branch of the Government. All that executive officers can do under provisions for taxation is to supply regulations to carry into effect what Congress has enacted, as decided by the Supreme Court in *Morrill v. Jones*, 106 U. S. 466, above referred to, or to ascertain the existence of facts upon which provisions of law may take effect, as in the case just discussed.

To the same effect are State decisions. We cite the syllabus of the decision of the Supreme Court of Maine in *Brewer Brick Co. v. Brewer*, 62 Maine, 62, as follows :

"It is for the legislature to determine what property, real and personal, shall be subject to, and what shall be exempted from taxation.

"The legislature can not constitutionally transfer to municipal corporations the power of determining upon what property, real or personal, taxes shall and upon what they shall not be imposed."

Also from the case of *State v. Hudson County Commissioners*, 37 N. J. Law, 12, 13, 19, 20 :

"It is illegalized, from the presence in it, of a delegation to this official body of powers which can be exercised by the legislature alone, and which are not, in their

nature, transferable to any other branch of the government or its agents (p. 13).

"The legislature has transferred to these Commissioners a part of the law-making power. A legislative act of taxation, in order to be legal or effective, must consist of something more than a mere declaration that a certain sum of money shall be raised out of the property within a county. Itself must distribute the burthen. This is as essential as the designation of the amount to be raised. And not only the sum required must be stated, and the property out of which it is to be made designated, but also some certain standard of assessment must be established. No act of taxation can omit any of these components. If the legislature of this State should ordain that a tax of a certain amount should be levied, to be distributed among the counties of the State, in such proportions as the treasurer, in his discretion, should direct, it would not probably be denied by any one, that such an act would be entirely inoperative" (pp. 19, 20).

### **A Constitutional Construction to be Preferred.**

Possibly it will be contended that Congress may have meant by this act to make an unconstitutional delegation of power to the Secretary. Of course, if Congress had in express terms enacted that alcohol used in the arts should be taxed or not, at the discretion of the Secretary of the Treasury, the court would only have to decide whether Congress could thus constitutionally delegate the power of taxation. If, following the uniform line of decisions to that effect, it were held that it could not constitutionally be so delegated, the act would have to be declared void. That, however, is not the present case; for Congress has in language substantially similar to that repeatedly employed in revenue statutes, provided for a remission of the tax on alcohol used in the arts "under regulations to be prescribed by the Secretary of the Treasury." The only question is, shall the clause requir-



ing regulations be treated as subordinate to the main object of the section, vesting in the Secretary the power simply to carry out by reasonable regulations the purpose of the section, or shall it be construed as an unconstitutional delegation of the discretion to tax, or not to tax, to the Secretary of the Treasury?

The number of instances in which acts of Congress have been held unconstitutional is very rare, and the purpose to pass an unconstitutional statute is never imputed to Congress unless every other hypothesis is excluded by the unmistakable character of the language employed.

Such a construction will, therefore, be rejected by the court; for where a statute is open to two constructions, one of which would render it constitutional and valid, and the other unconstitutional and void, the courts, with a view to upholding what the legislature has enacted, will always adopt the former. *Presser v. Illinois*, 116 U. S. 252, 269.

In the present instance the power, which the Secretary of the Treasury has in effect asserted by his refusal to make regulations, is a power claimed for himself, an executive officer, to tax an article which Congress has said shall be free of tax.

To admit the existence of such a power is to disregard the fundamental division of powers between the legislative and executive departments of the government as established by the Constitution, and ever since maintained.

## **VI. THIS SECTION NOT A STATUTE OF EXEMPTION.**

Some positions are taken by the Court of Claims apparently as arguments leading up to their conclusion

that the regulations were an essential pre-requisite to claimant's right. These are :

1. That this section is a statute of exemption and must be strictly construed (Rec. 33).

2. That the failure of Congress to make an appropriation to carry out §61 and its subsequent repeal by the act of June 3, 1896 (29 Stat. L. 195), were a legislative construction of the act of 1894, that regulations were essential to its operation (Rec. 35).

These will be severally considered.

### **Extent of Rule of Strict Construction.**

The Court of Claims relies upon the well-known rule laid down in the case of *Winona and St. Peter Land Co. v. Minnesota*, 159 U. S. 526, "that statutes exempting property from taxation are to be strictly construed."

The rule was intended to apply only to cases where the property of a particular person or corporation was singled out for exemption. It has no application whatever to a case where an article previously subject to taxation has by a new statutory provision been relieved from tax, and where the repeal of the tax operates upon all persons and corporations alike.

It has already been seen that §61 is the adoption of a new policy of taxation of distilled spirits, already in force in other commercial countries, repeatedly urged in this, and based upon the reason, and not the accidents, of the thing taxed. The duty of the courts, in interpreting a statute initiating such a policy is to give intelligent effect to its purposes, so far as fairly expressed in the terms used.

If Congress in the original imposition of internal revenue tax on distilled spirits had placed that burden only upon those intended for use as a beverage, it would not be claimed that those destined for use in the arts were

in any just sense of the term placed within a privileged or exempted class. They would simply not be within the class of taxable articles. In like manner when Congress in 1894 for the first time in the history of our internal revenue system adopted the rule of distinguishing between spirits used for beverages and those used in the arts, and enacted that the burden of such taxation should fall exclusively upon the former class, there was no special exemption of the latter. All persons bringing themselves within the terms of § 61 are at perfect liberty to use alcohol under its provisions, and, if they do so, are guaranteed by the section freedom from taxation. That this freedom is brought about, not by original absence of tax but by first collecting and then refunding the tax, can make no difference in principle.

So far from coming under the rule that a statute granting a special exemption is to receive a strict construction, this section comes rather under that other well-settled rule that express language is required to authorize the imposition of a tax. As was said in *United States v. Watts*, 1 Bond, 580 :

"It is the duty of the courts of the Union, undoubtedly, so far as they are invested with any agency in carrying out the financial purposes of the government, fairly to enforce the revenue laws of the country, and see that they are not fraudulently evaded. But they are not at liberty, by construction or legal fiction, to enlarge their scope to include subjects of taxation not within the terms of the law."

In *American Net and Twine Company v. Worthington*, 141 U. S. 468, 474, it was said :

"Were the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in a clear and unambiguous

language. *United States v. Isham*, 17 Wall. 496; *Hartranft v. Wiegmann*, 121 U. S. 609; *Gurr v. Scudds*, 11 Exch. 190."

In *United States v. Isham*, 17 Wall. 496, 504, the rule was thus stated:

"If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in *Gurr v. Scudds*, 'a tax can not be imposed without clear and express words for that purpose.'"

In *Hartranft v. Wiegmann*, 121 U. S. 609, 616, it was said:

"If the question were one of doubt, the doubt would be resolved in favor of the importer, 'as duties are never imposed on the citizen upon vague or doubtful interpretations.' *Powers v. Barney*, 5 Blatchford, 202; *United States v. Isham*, 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sumner, 384."

Judge Lacombe in *McCoy v. Hedden*, 38 Fed. Rep. 89, 91, referred to this rule as,—

"The familiar principle of law that the property of the citizen shall not be taken on ambiguous and doubtful construction."

The present statute is entitled to the same liberality of construction as applied to those cited, and should not be construed as subjecting alcohol used in the arts to a burden of taxation which Congress manifestly desired to remove.

Perhaps the fullest statement of the rule is in the case of *Rice v. United States*, 53 Fed. Rep. 910, 912:

"The rule for the construction of statutes levying taxes or duties on the citizen is laid down by Lord Cairns, in delivering the judgment of the House of Lords (*Partington*

v. *Attorney General*, L. R. 4 H. L. 100, 122) in this language:

"As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, can not bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an "equitable construction," certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

"Judge Story says:

"It is a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specially pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense either remedial laws, or laws founded upon any permanent public policy, and therefore are not to be liberally construed." *U. S. v. Wigglesworth*, 2 Story, 369.

"And this is the uniform doctrine of the authorities. *Net & Twine Co. v. Worthington*, 141 U. S. 474; *U. S. v. Isham*, 17 Wall. 496; *Hartranft v. Wiegmann*, 121 U. S. 609; *Powers v. Barney*, 5 Blatchf. 202; *Dean v. Charlton*, 27 Wis. 526; *Suth. St. Const.* 461, 462; *Cooley, Tax'n*, (2d Ed.), 266; *Dwar. St. p.* 749."

The principle here stated fully applies to a case of rebate like this, for the analogous instance of a drawback of customs duties is likened by the Supreme Court to a case in which the goods were made free of duty.

"The drawback provision was simply a mode of making the linseed so imported and exported without distribution in the country duty free, and we see no gratuity in the case." 107 U. S. 413.

## **VII. NO LEGISLATIVE CONSTRUCTION.**

The Court of Claims has said (Rec. 35) that there has been a legislative construction by Congress of § 61, arising from two facts :

(1) That at the first session after the enactment of the law and the failure of the Secretary to prescribe regulations, he communicated to Congress the fact that no regulations had been prescribed and that Congress with attention invited to his failure, made no provision to meet the condition mentioned in the report (Rec. 9).

(2) That after a delay of nearly two years, on June 3d, 1896 (29 Stat. L. 195), Congress repealed § 61.

### **The Failure to Make Appropriation.**

There is no authority to be found in the whole range of judicial decisions for the position that mere silence on the part of a legislative body can be regarded as an affirmative act, putting a construction upon its previous legislation. Legislative bodies act only through measures of legislation passed in the forms prescribed by the Constitution. The fact that they do not act upon a particular subject may be due to such a great variety of causes other than an affirmative desire not to act upon it, that it can never be safely adopted by the courts as a ground of judicial decision. The well known difficulties in obtaining action by Congress on any subject, arising in no small degree from the fact that in the House of Representatives legislation is wholly in charge of the committees and largely under control of the Speaker, and that in the Senate the right of debate is practically unlimited

and can be, and is, used as a means of obstruction, repel the idea that the failure of Congress to act upon any subject is due to a deliberate desire to withhold action thereon.

### **No Estimate by Secretary.**

The failure of the Secretary of the Treasury to prescribe regulations was placed by him upon the ground that "no appropriation whatever, either special or general, has been made by Congress for the purpose mentioned or for any other purpose connected with the execution of the section of the statute referred to." (Finding VII, Rec. 7.)

He failed to give to Congress any estimate for an appropriation in the manner required by law.

The act of July 7, 1884, paragraph 2, 1 Supp. R. S. 470, 23 Stat. L. 254, provides as follows:

"And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner;

"And the said Secretary shall first cause the same to be properly classified, compiled, indexed, and printed, under the supervision of the chief of the division of warrants, estimates, and appropriations of his Department."

In estimating for the expenses of the income tax imposed by this same act and transmitting his estimates to Congress (H. R. Ex. Doc. 13, 53d Cong. 3d Sess. p. 4) the Secretary was careful to follow exactly these directions.

The Court of Claims has inserted in the findings (Rec. 9) a statement from the annual report of the Secretary of the Treasury for 1894 that "the expenses of the necessary offi-

cial supervision will not be less than \$500,000 per annum." But in a foot-note to the same report (apparently overlooked by the Court of Claims, as it is omitted from the findings), he raises this to an even million (Rep. Sec. Treas. 1894, p. LXVI). The Commissioner of Internal Revenue on November 28, 1894, stated it at "not less than \$500,000" (Report Sec. Treas. 1894, p. 975), but on May 9, 1895, increased this sum (Report Sec. Treas. 1894, p. 992) to \$1,000,000 in one passage of a communication of this date and to \$10,000,000 in another passage of the same communication.

In the communications thus informally placed before Congress on this subject, the Secretary failed to give any consistent or even intelligent statement of the amount probably requisite for carrying out this law.

It is not to be wondered at that Congress should have failed to make an appropriation in view of the varying statements of the amounts required based upon what is manifestly nothing better than guesswork.

It is a matter of judicial knowledge that the appropriation bills are framed upon formal estimates made as required by law, and that mere recommendations made in a general manner in the annual report, or in miscellaneous communications to Congress, are seldom, if ever, regarded by the committees in making up the appropriation bills, even if in order under the rules of the two Houses.

The correctness of this position is shown by the fact that a proposition in the Senate to make an appropriation for this very purpose was laid on the table on the precise ground that no Treasury estimate had been submitted for it (Cong. Rec. 53d Cong. 3d Sess. part 2, page 1027).

From the failure of Congress to make appropriations for which no formal estimate was ever submitted by the Department no conclusion unfavorable to the continued



force of the law can be drawn. It may just as well be said that it was due to the legislative opinion that existing appropriations were available for use under § 61. It will hereafter be shown that this was the case (*post*, p. 76).

### **The Repeal of Section 61.**

Were it not for the position taken in the opinion of the Court of Claims, it would not be thought necessary to treat seriously the suggestion that the repealing act of 1896 constituted a legislative construction of the repealed act of 1894. What means had the 54th Congress, which passed the repealing act, of knowing what was the intention of the 53d Congress, composed largely of different members, which passed the repealed one? What is there in the act of 1896 which in any manner indicates a view of that of 1894 inconsistent with its being valid legislation? The first section of that act repealed the act of 1894; the second authorized and directed the appointment of a joint select committee to consider all questions relating to the use of alcohol in the manufactures and arts free of tax. If this act indicated anything at all, as to the construction of the prior legislation, it was in favor of the policy of free alcohol in the arts and indicative of a purpose on the part of Congress to resume in some form the same policy of freedom from tax. In truth, however, the repealing act of 1896 is valueless as a legislative construction either way of that of 1894. Rights had by that time become vested upon which the courts alone could pass and which Congress was powerless to divest by any new legislation, whether under the guise of legislative construction of a prior law or otherwise.

It has already been pointed out (*ante*, p. 44) that after the Secretary of the Treasury had made the regulation pronounced unlawful by this court in *Morrill v. Jones*,

106 U. S. 466, Congress by a later revenue act, made the Secretary's regulation a part of the law; but it was never suggested that the effect of the new enactment was to put a legislative construction on the old law confirming the Secretary's regulation.

It is only necessary to ask, in order to show the fallacy of this line of argument, what were claimant's rights between April 24, 1895, when this claim had entirely accrued, and June 3, 1896? Were they in any wise different before and after the latter date? Any attempt to answer these questions destroys at once the argument based on a supposed legislative construction.

If § 61 was valid legislation at the moment of its enactment (and the contrary is not claimed) when did it cease to be such? On the first Monday of December, 1894, when the Secretary of the Treasury informed Congress that he could not or would not execute it? On the 3d of March, 1895, when the 53d Congress adjourned without taking any action on that report? The impossibility of assigning any of these or other dates that might be suggested leads to the only answer that legal principle will justify, viz.: that the section ceased to be in force on June 3, 1896, when Congress by a valid act passed in the forms prescribed by the Constitution, repealed it.

## **VIII. THE RELATION OF REGULATIONS AND APPROPRIATIONS.**

### **The Objection of the Treasury Department.**

The ostensible reason of the Treasury Department for failing to make regulations (Rec. 8, 9) was that regulations could not be made without supervision, and supervision could not be undertaken without appropriation and Congress had made no appropriation.

There are two sufficient answers to this proposition :

(1) That it was the duty of the Secretary of the Treasury to make and enforce such regulations as were within his statutory powers.

(2) That adequate appropriations existed for this purpose.

### **The Secretary's Duty to Make Regulations as far as Permitted by Existing Law.**

The true rule for executive officers in the enforcement of all laws was tersely stated by the late Justice Lamar while Secretary of the Interior, in his instructions to the Commissioner of the General Land Office (Land Office Report, 1887, p. 311) :

"What the statute confers the statute means to be enjoyed. What the statute directs it means to have done. Not to do it, or even to delay unnecessarily the doing of it, is to violate the statute and involves a grave dereliction of duty."

It is believed that no court has ever applied to the enforcement of any statute the delusive test of inadequacy of appropriation or impracticability of administration.

The duty to prescribe regulations being cast by Congress upon the Secretary of the Treasury, he should have done whatever statute permitted him. The responsibility for the law was on Congress. If his powers were inadequate and later experience so showed, the responsibility was with Congress after the Secretary had used all available means to carry out the law.

### **The Act Implies all Powers Necessary for its Execution.**

"Every statute is understood to contain, by implication, if not by its express terms, all such provisions as

may be necessary to effectuate its object and purpose, or to make effective the rights, powers, privileges, or jurisdiction which it grants, and also all such collateral and subsidiary consequences as may be fairly and logically inferred from its terms." Black on Interpretation of Laws, p. 62.

A strong instance of this character is found in repeated decisions of the Supreme Court of the United States, that where municipal corporations are authorized to borrow money, without provision for payment of the loan, the acts authorizing the loan by implication confer power to levy a tax for its payment. *United States v. New Orleans*, 98 U. S. 381, 393; *Ralls County Court v. United States*, 105 U. S. 733. It was said in the former of these cases :

"When authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation. 'It is therefore to be inferred,' as observed by this court in *Loan Association v. Topeka* (20 Wall. 660), 'that when the legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.'"

The Supreme Court of New York applies the same rule in two well-considered cases, from which we quote as follows :

"Whenever a statute grants the power to do an act, with an unrestricted discretion as to the manner of ex-

executing the power, all reasonable and necessary incidents in the manner of executing the power are also granted." *People v. Eddy*, 57 Barb. 593.

"When a power is given by statute, everything necessary to make it effective, or requisite to attain the end, is implied. 1 Kent Com. (5th ed.) 464. So, where the law commands a thing to be done, it authorizes the performance of whatever may be necessary for executing its commands. *Foliamb's Case*, 5 Coke, 116." *Green v. Mayor of New York*, 2 Hilton (N. Y.) 203, 209.

In the recent case of *United States Electric Lighting Company v. Commissioners of the District of Columbia*, 24 Wash. Law Rep. 775, 777, this rule was applied. It was held that a requirement that certain streets and public parks should be lighted by electricity, had the effect of conferring upon the Commissioners of the District the power to grant to the electric lighting company accepted as the successful bidder for such work, permits to open the streets to lay wires for that purpose, although, by acts previously in force, this power was withheld. The court thus reasoned :

"This being so, if the Commissioners have no general power to permit wires to be laid under the surface of the streets, that part of the law authorizing 'extensions of such service' in the District bill, and the lamps in parks in the Sundry Civil bill, would be a nullity, unless the statute creates an implied power in the Commissioners to permit the laying under the surface of some streets the wires necessary to supply such additional service. Such implication is in accordance with the rule of interpretation that where authority is given by a statute to do a particular thing, it confers all powers necessary for the accomplishment of the main purpose, and that whatever is thus necessarily implied in a statute is as much a part of it as what is expressed therein. This rule has been stated and applied by the Supreme Court in numerous cases, amongst which the following may be cited :

"*U. S. v. New Orleans*, 98 U. S. 393-4; *Rolls Co. Court v. U. S.* 105 U. S. 735-6; *U. S. v. Babbitt*, 1 Black, 61; *Gelpeche v. Dubuque*, 1 Wall. 221."

In the light of these decisions, it can not be said that the Secretary was left helpless, even if no appropriation existed. Indeed it might even be said, if it were necessary to go so far, in the determination of this case, that if, as contended by counsel for the United States, no appropriation existed enabling the Secretary to carry out regulations to put the section into force, and the only possible regulations absolutely required expenditures he could have provided by regulations for the payment of the expenses by those claiming the benefit of the act.

### **Appropriations Were Available.**

It is beyond question, however, that at the time of the passage of the act of August 28, 1894, appropriations were available to pay the expenses of inspecting and supervising the use of alcohol under § 61 of that act.

### **Analysis of Internal Revenue Appropriations.**

The general tendency in making appropriations is toward a strict specification of the objects of appropriation, limiting the executive discretion. A different plan has been followed in regard to the expenses of the Internal Revenue system. Beside certain minor permanent and indefinite appropriations provided for by Rev. Stat. § 3689, to pay drawbacks on exportation of articles upon which Internal Revenue tax had been paid, to refund taxes illegally collected and to redeem stamps, the entire expenses of the Internal Revenue system for the year ending June 30, 1895, were provided by the following appropriations:

By act of July 31, 1895, making appropriations for the

legislative, executive and judicial expenses (28 Stat. L. 162):

For the official force in the office at Washington, \$261,590 (p. 177).

For stamp agent and counter, \$2,500 (p. 177).

"Collecting Internal Revenue.—For salaries and expenses of collectors and deputy collectors and clerks, including transportation of public funds, and also including expenses incident to enforcing the provisions of the Act of August 2, 1886, taxing oleomargarine, and the Act of August 4, 1886, imposing upon the Government the expense of the inspection of tobacco exported, and any necessary expenses under the Act of October 1, 1890, respecting bounty on sugar," \$1,710,000 (p. 180).

"For salaries and expenses of agents and surveyors, fees and expenses of gaugers, salaries of storekeepers, and for miscellaneous expenses," \$1,900,000 (p. 181).

By act of August 18, 1894, making appropriation for sundry civil expenses (p. 372):

"For detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws or conniving at the same, including payments for information and detection of such violations," \$50,000 (p. 388).

### **General Appropriations Always Used for all Internal Revenue Purposes.**

While the chief appropriation is by title, for "Collecting Internal Revenue," the actual operations of the internal revenue laws embrace many acts not strictly of collection, but incidental to the system. These will be referred to in detail hereafter. Many of these are very similar to the acts required of the Internal Revenue Bureau by § 61, refunding of taxes already paid or the release from taxation of alcohol used for specific purposes. The expenses of all such incidents to the

collection of internal taxes have been uniformly, for many years, paid from the appropriations cited above. There have been no other appropriations. The internal revenue laws have been construed as one system and the appropriations as made have been considered available not only for their primary object, "Collecting Internal Revenue," but for all the minor incidents of the system, even if not strictly collecting. Such an object, for which the appropriations were equally available, was the supervision of refunding taxes under § 61.

The practice of the Treasury Department in thus construing these appropriations is authoritative and, in the light of the uniform usage of many years and for many purposes, the position of the Secretary as to §61 was singularly inconsistent and difficult to explain on a theory of a real desire to execute the law.

Some of these incidental requirements of the internal revenue laws for which these general appropriations are, and have long been used, may be detailed as follows :

*a.* ALCOHOL FREE OF TAX ON EXPORTATION.

By § 3329, Revised Statutes, as amended by § 10 of the act of May 28, 1880 (1 Supp. R. S. 287; 21 Stat. L. 148), distilled spirits, upon which taxes have been paid, may be exported with the privilege of drawback. By § 3330, as amended by the act of June 9, 1874 (1 Supp. R. S. 12; 18 Stat. L. 64), and § 11 of the act of May 28, 1880 (1 Supp. R. S. 287; 21 Stat. L. 148), distilled spirits may be withdrawn from bonded warehouses and exported without payment of taxes. Like provision is made by § 5 of the act of March 3, 1887 (1 Supp. R. S. 140; 19 Stat. L. 394), as to fruit brandy.

Section 3161, Revised Statutes, provides for the appointment and duties of a superintendent of exports to carry out § 3329, under certain conditions, although the



duties required of him are to be performed, in his absence, by the Collector. The Collector is also obliged, by § 3444, to render a monthly account to the Commissioner of taxed articles exported in bond.

There were 6,114,417 gallons of distilled spirits exported under § 3330, in bond without payment of tax, in the year ending June 30, 1894 (Finance Report, p. 664). The removal of such spirits from bonded warehouses consumes the time of revenue officers stationed at those warehouses, and it requires supervision in transit or on export. The duties thus performed are not in the strictest technical sense performed in "collecting internal revenue." They are performed in freeing certain classes of otherwise taxable articles from the internal revenue tax. It is the opposite of collecting internal revenue; it is seeing that revenue is not collected. Yet no separate appropriation is required and no separate set of officers. The duties are performed by the collectors and their subordinate officers who are paid out of the appropriations for "collecting internal revenue." R. S. § 3678 says:

"All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

But this prohibition has never been considered applicable because the drawback or the exportation in bond is an incident arising out of the fact that internal revenue is collected. It is a part of the system.

It is specially provided in the general appropriation (*ante*, p. 77) that it shall be available for expenses incident to the inspection of tobacco exported under the act of August 4, 1886 (1 Supp. R. S. 511; 24 Stat. L. 218), which are the same in character but less in amount than those incurred in the inspection of distilled spirits exported. Yet

no watchful Comptroller of the Treasury has thought to declare that the expression in the appropriation that the expenses of inspecting exported tobacco shall be borne from the appropriation for "collecting internal revenue" excludes the payment from the same appropriation of like expenses in the inspection of exported distilled spirits.

*b. MANUFACTURING IN BOND FOR EXPORT.*

Revised Statutes, § 3433, as amended by § 10 of the act of October 1, 1890 (1 Supp. R. S. 858; 24 Stat. L. 218), and § 9 of the act of August 28, 1894 (2 Supp. R. S. 309; 28 Stat. L. 548) provides for the manufacturing in bonded warehouses for export of articles made in whole or in part of materials subject to internal revenue tax. Under this statute, both tobacco and distilled spirits are used in manufactures, without payment of tax; the one for cigars and snuff, and the other for perfumery, medicinal preparations and alcoholic cordials.

The superintendents of these bonded warehouses are under the customs service, yet there must be a withdrawal for export from the distillery warehouse as under § 3330 and due superintendence of the lading of the distilled spirits and supervision to prevent their going into the open market before reaching the bonded manufacturing warehouse. The provisions of § 3444, requiring a return of goods withdrawn and a report to the Commissioner by the collector must be observed in regard to these distilled spirits.

These duties require the time and services of subordinate officers of the internal revenue stationed in the vicinity of the distillery warehouses. The law provides no other officers and no other appropriation than those under the head of "Collecting Internal Revenue" to accomplish this result, yet these acts are not concerned with the collection, but with seeing that the internal

revenue tax is not collected. Nevertheless, the general appropriation for collecting internal revenue is equally available and has equally been used for this purpose as for the more direct object of securing the payment of the tax on distilled spirits not made free by law.

*c. FREE ALCOHOL IN VINEGAR FACTORIES.*

Under the provisions of R. S. § 3282, acts of March 1, 1879, and June 14, 1879 (1 Supp. R. S. 231, 266; 20 Stat. L. 335; 21 Stat. L. 20), alcohol, from which vinegar is made, is manufactured free of tax in vinegar factories. Some supervision is exercised by internal revenue officers to prevent this free alcohol from reaching the open market in fraud of the revenue laws. This is never the subject of taxation. If an attempt is made to use it for other purposes than for vinegar, it is not taxed, but forfeited. No collection of an internal revenue tax is made under any circumstances on alcohol made in a vinegar factory; it is either free or wholly forfeited. Yet the inspection of such factories is paid for out of the general appropriations already detailed for collecting internal revenue.

*d. FREE ALCOHOL FOR SORGHUM SUGAR.*

Alcohol is granted free of tax for the manufacture of sorghum sugar under the act of March 3, 1891 (1 Supp. R. S. 930; 26 Stat. L. 1050). The Treasury Department has made elaborate regulations (Series 7, No. 7, Revised Supplement No. 1, 1891) for enforcing this law, and in these provides for expenses, all of which are to be borne from the appropriation for collecting internal revenue and for duties all of which are to be performed by the ordinary officers of internal revenue.

If the position of the Secretary of the Treasury as to § 61 was correct, that the law contemplated an appropriation in order to become an effective grant, and that the

appropriations for collecting internal revenue or for the service of officers then authorized were not available under this act, then similar action should have been taken under the act of March 3, 1891, and no regulations issued until Congress made a special appropriation or provided that the regular appropriations might be used under this law.

It is no answer to this to say that the duties under the act of March 3, 1891, might be performed by the existing corps of revenue officers, while those under § 61 could not be so performed. If the expenses of supervising the use of alcohol under this act were not properly payable from the appropriations for "collecting internal revenue," then it would be an unlawful diversion of the appropriation not only to pay the incidental expenses but to apply the services of the officers paid from it to this unwarranted use. The Secretary regarded neither act as unlawful and provided for the use of this appropriation and for the services of officers paid under it, for all purposes connected with the act of 1891. It was likewise his duty, if Congress gave him no additional official force, to endeavor to perform the additional duties imposed by § 61 with his available force and to report to Congress in due form the necessity for an increase, if he found their adequate performance impossible.

#### *c.* FREE ALCOHOL FOR SCIENTIFIC INSTITUTIONS.

While but a small amount of additional labor may be required under Revised Statutes, § 3297, and the act of May 3, 1878 (1 Supp. R. S. 159; 20 Stat. L. 48), providing free alcohol for scientific institutions, yet the collectors and other officers of internal revenue paid out of the appropriations for "collecting internal revenue" have no right to perform these services and to pay for them out of this appropriation, if not properly within the object of appro-

priation, although this has been the uniform practice of years. This practice shows that the principle has continuously been accepted that the appropriation for "collecting internal revenue" is not confined strictly to the mere collecting, but is equally available to the duties incidental to it, imposed by law upon internal revenue officers.

*f.* FREE ALCOHOL FOR FORTIFYING SWEET WINES.

The report of the Commissioner of Internal Revenue for the fiscal year ending June 30, 1896, states that there were distilled from grapes during that period in the United States (p. 67) 2,121,625 proof gallons of spirits. Of that quantity the Commissioner of Internal Revenue delivered free of tax (p. 197) under the act of October 1, 1890, §§ 42-49 (1 Supp. R. S. 866; 26 Stat. L. 621) as amended by the act of August 28, 1894, § 68 (2 Supp. R. S. 331; 28 Stat. L. 568) 1,527,962 proof gallons to be used in the fortification of sweet wines. Domestic wines not only paid no tax, but these statutes permit grape brandy or wine spirits (a product taxable as alcohol or distilled spirits under Rev. Stat. §§ 3248, 3254, 3255) to be added to sweet wines to an alcoholic strength of fourteen per cent producing after fortification, not exceeding twenty-four per cent of alcohol.

A very large amount of work is necessary in the execution of this law, on the part of employees paid under the appropriations for collecting internal revenue. Where the wine maker is also a distiller (§ 42) and uses the spirits distilled by himself, some of the services in connection with this tax-free alcohol may be, but need not be, performed by internal revenue employees already detailed to his distillery. Other users (§ 45) who are not also distillers require the special detail of an officer to their wineries to supervise the use of the spirits.

The Regulations (Series 7, No. 5) provide for filing a bond in duplicate with the Collector, one copy of which is sent to the Commissioner of Internal Revenue, for notice of intent to use spirits, for permits for removal, for a fortifying room under the control of an officer detailed by the Collector of Internal Revenue, for gauging, sampling and supervising the fortification of wines; for mixing under due supervision, for stamping by the official gauger and removal under his supervision; and for a report in duplicate to the Collector, who must forward one copy to the Commissioner. Samples must also be sent the Commissioner for analysis. Where the producer of sweet wines is not a distiller, he has to advise the collector of the distillery warehouse from which he desires to withdraw spirits and of the particular packages of grape brandy which he desires to withdraw. The Collector must send a gauger to examine and report upon them, an entry for withdrawal has to be made and an exact statement of the route in transportation from the special bonded warehouse to the winery must be made, the shipments to be made, where practicable, over bonded routes. An official permit is given by the Collector, the gauger affixes transfer stamps upon the packages and cuts or burns the name of the distillery, the district and other particulars. The store-keeper delivers the spirits to the party named in the Collector's certificate and the wine maker must deliver to the Collector through bills of lading, the carrier agreeing to transport the packages in bond. The Collector forwards one copy of the bill of lading to the Commissioner of Internal Revenue and proof must be made of the delivery of spirits at the winery within the time specified in the bond. On its arrival, notice must be given to the Collector, and the gauger must then supervise the fortification, as in the case of the distiller who is also a producer. For the ex-

pense of all this supervision, the general appropriations for "collecting internal revenue" are alone available and have uniformly been used. Yet this is not in a strict sense "collecting"; it is an incident of the internal revenue system.

The argument applies equally in the case of supervising tax-paid alcohol used in the arts, upon which a rebate was to be paid under § 61. The Collector's duties do not end with mere collection. He has to hold and protect the funds and see that they reach the Treasury. It would not do for him, having once collected the revenue, to say that some one else must take care of it. While he has to defend it from the direct assaults of burglars, it is equally his duty to defend it from any attempt to secure its refund or rebate unlawfully. It is consequently a necessary part of its collection that an unlawful attempt to take it out of the Treasury should be resisted. While the Collector and other revenue officers, as an incident to their duties under the free alcohol law for sweet wines, watch the alcohol until it is mixed with the wine, because a tax is payable if not so mixed, so also they are required to watch the alcohol on which the tax has already been paid until actually used in the arts; because, if not so used, the amount collected remains in the Treasury, or, if subsequently re-distilled, a tax or penalty must be paid on it.

The rectification and sale of distilled spirits in all their forms are hedged about by the internal revenue laws and regulations in such manner that any oversight of a user of alcohol for any purpose is but a part of the system of seeing that the laws designed for "collecting internal revenue" are not violated.

Thus, any attempt on the part of a manufacturer using alcohol in the arts, or in medicinal or other like compounds, to manufacture something in the nature of a

beverage without paying a special tax and taking out a license as a rectifier, would at once bring him within the provisions of § 3244, paragraph 3, of the Revised Statutes. Likewise any manufacturer who should sell any alcohol, either in the original shape in which he purchased it or after recovering it from any article in which he had used it, would thereby become a wholesale or retail liquor dealer, and be required by § 3244, paragraph four, to pay a special tax and obtain a license as such. The rectifier, or wholesale or retail liquor dealer, as the case might be, would thereby at once place himself under the supervision of officers of internal revenue, where every movement would be subject to surveillance by Government officers.

*g.* REMISSION AND REFUNDING OF TAXES.

Revised Statutes §§ 3220 and 3221 (the latter amended by act of March 1, 1879, § 6, 1 Supp. R. S. 235 ; 20 Stat. L. 341) relate to the remission and refunding of internal revenue taxes and penalties. All the work connected with the investigation of all such applications must be performed by the Commissioner's subordinates in his office, and by local officers in the field, all of whom are restricted, either by substantive law or by appropriation acts, to service in "collecting internal revenue." Yet the right to perform and pay for these services, incidental to the strict collection has never been disputed.

*h.* BOTTLING IN BOND.

A very recent act, that of March 3, 1897 (29 Stat. L. 626), to allow the bottling of distilled spirits in bond imposes upon local officers arduous duties, not to be classed, in the strict construction applied by the Secretary to § 61, as "collecting internal revenue." After distilled spirits have been entered for withdrawal upon payment



of tax or for export in bond without payment of tax, they may be purified, if desired, bottled in the distillery, cased, stamped and branded, in the presence of the United States revenue officer, and, if intended for export, are to be transported under such regulations as may be prescribed.

The report upon this bill (H. R. Rep. 1495, 54th Cong. 1st Sess.) says :

"The obvious purpose of the measure is to allow the bottling of spirits under such circumstances and supervision as will give assurance to all purchasers of the purity of the article purchased."

The report explains that American producers can under this law supply a demand for bottled goods under a stamp which has in the past been met by Canadian goods under Canadian law. This policy has nothing to do with collecting internal revenue, even in case of the domestic use of the bottled spirits; for to entitle the goods to the privileges of this act they must already have been entered for withdrawal upon payment of tax. Where bottled for export, no tax is ever paid.

In spite of this, the Secretary of the Treasury has not refused to carry out this law, because he has no appropriation available for it, although he has no other appropriation than that for "collecting internal revenue." It is noticeable also that this act was passed long after his decision that existing appropriations were not available for enforcing § 61 of the Act of 1894.

#### i. THE CUSTOMS APPROPRIATIONS.

A similar broad practice prevails in the construction of the customs appropriations. This service is supported in large part by a permanent annual appropriation, under Rev. Stat. § 3687. That appropriation is "for the

expenses of collecting the revenue from customs." It is used for all customs purposes, both for salaries and miscellaneous expenses. It is, indeed, the only head of appropriation for the entire customs service except certain permanent appropriations under Rev. Stat. § 3689 for debentures and other charges, drawbacks, bounties and allowances, distributive shares of fines, penalties and forfeitures, repayment of excess of deposits and refunding duties and proceeds of sales. Among the expenses paid from the appropriation for "collecting the revenue from customs" are those of the supervision of the bonded warehouse system (act of August 28, 1894, § 9, 2 Supp. R. S. 309; 28 Stat. L. 548) where goods subject to import and internal tax are manufactured without payment of duty and again exported. The expenses of § 13 (2 Supp. R. S. 311; 28 Stat. L. 550) admitting machinery for repair without duty, are also paid out of this appropriation and those of § 21 (2 Supp. R. S. 312; 28 Stat. L. 551) permitting smelting in bonded warehouse.

The expenses also of repayment of drawback under § 22 (2 Supp. R. S. 313; 28 Stat. L. 551) upon imported duty-paid materials entering into articles manufactured in the United States and exported are defrayed from the same appropriation for the "expenses of collecting the revenue from customs." This section is the counterpart of § 61. It provides for the refund of customs duties upon the happening of certain events—the use of the duty-paid article in manufacturing and its exportation. Section 61 provides for the rebate of an internal revenue tax upon the use of the taxed article in the arts or manufactures.

In the one case, the Secretary of the Treasury has continually paid the expenses of settling the drawbacks out of the appropriation for the "expenses of collecting the revenue from customs." In the other, the same officer

insisted that the appropriations for "collecting internal revenue" were never available.

The construction of years followed in the Treasury Department is right and should be adopted in its application to the internal revenue appropriations as it has, in all cases, been actually followed by the Treasury Department.

### **The True Principle of Construction.**

These many precedents drawn from both branches of the revenue service show that the uniform rule has been to avoid a strained construction of the general appropriations for collecting the revenue. It is essential to the revenue service that the appropriations should be general in character in order to leave room for wide executive discretion in the use of appropriate means for enforcing the entire revenue system. There is no warrant for invoking a judicial decision that this long-settled executive construction is erroneous.

The true principle of construction is that the appropriation for the salaries and expenses of collectors, agents, surveyors and other internal revenue officers is intended to be used for all the duties imposed by law or by regulations made in accordance with law upon these officers. They are directed by Congress to perform certain duties. General appropriations are made under a head appropriate to the chief purposes of the existence of their offices and these appropriations are available to pay their salaries and all the expenses incidentally arising in the performance of their numerous duties.

Section 61 gives power to the Secretary of the Treasury to prescribe regulations. Under these regulations duties would be required of collectors, and perhaps of agents, store-keepers, gaugers and other internal revenue officers. The appropriations to pay their salaries would

be available for service while performing these duties, equally as well as in receiving payment of taxes.

This law also directly imposes a duty upon the collector. Before the manufacturer is to receive the rebate he must exhibit and deliver up his stamps and present satisfactory evidence to the Collector of Internal Revenue of his use of the alcohol in the manner contemplated by the law. The collector being thus the officer specially charged with the administration of the act, all appropriations for the payment of collectors and deputy collectors of internal revenue are available to carry out the act and are the only appropriations legally necessary for that purpose, however convenient it might be in the judgment of the Commissioner of Internal Revenue to have other and special appropriations. The appropriation for his salary, even though under the head "collecting internal revenue," is necessarily available to pay him for all services prescribed by law.

That appropriations were in existence for the payment of these officers is not denied; and, this being so, it was just as incumbent upon them and their official superior, the Secretary of the Treasury, to use these appropriations for the performance of their duties under § 61 of the act of 1894, as under any other provision of the law prescribing their duties. This must be so unless the underlying implication of the position of the Secretary of the Treasury be correct,—that other laws, supposed to be of greater importance than § 61, were to be first enforced with the means at command, and then, if consistent with such convenient enforcement, § 61 could also be enforced. Hence, even if we concede the position taken by the Secretary,—that an appropriation for the enforcement of the section is necessary for its operation,—an appropriation existed for the payment of the only officers charged with any special duty under the section, and

it was, therefore, quite capable of being enforced. Whether these appropriations were or were not adequate is beside the point. It was the duty of the officers to execute all statutes to the best of their ability, and whether a law requiring the raising of revenue, or one requiring its "rebate or repayment," be of superior authority was a question which no executive officer of the Government was authorized to raise or consider in the discharge of his official duties.

The construction here contended for reads the internal revenue code as a single system and construes the law as heretofore uniformly held by the Treasury Department.

### **Section 61 Not a Novelty.**

Much of the difficulty in regard to this question disappears when the internal revenue laws are thus reviewed. It is then seen that alcohol free of tax is not a new subject under the internal revenue laws, but that § 61 is a substitution of a wider general policy for a series of special exemptions which the law had already known. The difficulties both of law and of regulation which have been raised in regard to this act differ only in extent from those met and solved under other special laws. The real reason for the non-enforcement of this section is not to be found in the official correspondence relating to this subject but in the history of the times and the condition of the public treasury for months following the passage of the act of August 28, 1894.

## **IX. THE CLAIMANT'S COURSE FOLLOWED STATUTORY AUTHORITY.**

The correspondence in regard to the issuance of regulations is in Finding VII (Rec. 7-9). This was entirely within the Department, and not for the public. The

public circular actually sent to inquirers "in consequence of" the letter of the Secretary of October 6, 1894, is as follows (Rec. 9):

*"Circular relative to applications for rebate under § 61 of the act of August 28, 1894.*

*"WASHINGTON, D. C., November 24, 1894.*

"In view of the fact that this department has been unable to formulate effective regulations for carrying out the provisions of § 61 of the act of August 28, 1894, relating to the rebate of tax on alcohol used in the 'arts, or in any medicinal or other like compounds,' collectors of internal revenue will, on receiving notice from manufacturers of the intended use of alcohol for the purposes named, advise such manufacturers that, in the absence of regulations on the subject, no official inspection of the alcohol so used or the articles manufactured therefrom can be made, and that no application for such rebate can be allowed or entertained.

*"JOS. S. MILLER, Commissioner."*

This is the only announcement made to inquirers of the position of the secretary and of his reasons.

It has already been suggested (*ante*, p. 27) that this circular may be regarded as a regulation intended to repeal or annul the law, which was declared by this court (*Campbell v. United States*, 107 U. S. 410) to be no bar to an action for recovery.

Prior to the issuance of this circular, manufacturers using alcohol under the arts were ready to be subjected to official inspection, if required, and if they met the official requirements, to obtain pay directly from the Treasury. After the secretary had thus declared himself free from all responsibility conferred upon him by the statute, the claimants correctly sought the very relief granted to all persons whose right to payment from the public treasury is denied by the executive. This is redress through the courts.

There are two systems provided for obtaining payment of claims against the United States, one by application to the Treasury Department (Rev. Stat. § 236; act of July 7, 1884, paragraph 2, 1 Supp. R. S. 470, 23 Stat. L. 254; act of July 31, 1894, §§ 3-22, 2 Supp. R. S. 212-219, 28 Stat. L. 205-211); the other by securing a judgment of a court of competent jurisdiction under the act of March 3, 1887 (1 Supp. R. S. 559; 24 Stat. L. 505) or other statute. The latter system is, in general, contemplated only in case the application to the executive tribunal fails. Section 61 of the act of August 28, 1894, contemplated primarily the use of the former system and settlement of the claims at the Treasury. The Secretary, for reasons which were not legally sound but which were in his opinion sufficient, refused relief at the Treasury and necessarily referred all applicants for relief to the latter system.

The courts are specially organized for the ascertainment of disputed facts, and it has never been suggested in a judicial tribunal that the rights of the government are less carefully protected in the courts than in the executive departments, or that there is any greater danger of fraud in the former than in the latter tribunal.

This claimant, seeking the remedy left him, after the action of the Secretary of the Treasury, now presents himself to this court with a finding of the Court of Claims of every fact made essential to recovery by the law in the very manner left open to him by the Secretary in denying official inspection and executive determination.

Had the Secretary made regulations requiring official inspection no rights would have accrued to claimants unless the manufacture had been inspected; but this circular rendered them free from the need of inspection and permitted their cases to be proved by evidence

preserved by them and submitted under juridical safeguards.

## **X. A SUIT IN THE COURT OF CLAIMS THE ONLY APPROPRIATE REMEDY.**

It was not claimed in the court below, and probably will not be here, that any other remedy than a suit in the Court of Claims was open to this claimant, such as an application for a writ of mandamus to compel the Secretary of the Treasury to carry out the duty of prescribing regulations devolved upon him by the section in question. A reference to several decisions of this court will make it plain that such an application would not have been granted. But, even if granted, it would have been wholly inadequate as a remedy for this appellant's grievances.

### **Mandamus Can Not Issue Where Discretion is to be Exercised.**

In the case of *The Secretary v. McGarrahan*, 9 Wall. 298, the court thus stated the rule (p. 312) :

"Though mandamus may sometimes lie against an executive officer to compel him to perform a mere ministerial act required of him by law, yet such an officer, to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as part of his official functions.

"Discussion of the principle, however, seems to be unnecessary, as all of the cases appear to affirm the same rule, that the writ can not issue where discretion and judgment are to be exercised by the officer, and only in cases where the act required to be done is merely ministerial, and where the relator is without any other adequate remedy."



*United States v. Knox*, 128 U. S. 230, was a suit in the Court of Claims by a United States Commissioner for fees of office. The principal objection made to the allowance of the claim was that the account had not been approved by the United States Circuit Court as required by law, and that it was incumbent on the claimant before bringing suit on the account to obtain such approval, and, if necessary, to resort to a writ of mandamus to compel the court to approve the account, as well as to compel the district attorney to present it for approval, that being the only mode provided by law for getting it before the Circuit Court for that purpose. The court said, however (p. 235):

"But as we feel well assured that the claimant, who has done everything in his power to secure action upon his account by the district attorney and the court, and who has a just claim against the government for services rendered under the act of Congress, has a remedy in the Court of Claims, we do not see why he should be compelled first to resort to a writ of mandamus against the Circuit Court. This remedy, always an unusual one and out of the ordinary course of proceeding, would be attended in the case before us with delay and embarrassment. It is not by any means so efficient nor so speedy as an action in the Court of Claims. If he should succeed after trouble, delay and expense, in procuring action by the local court, which might be either an approval or a disapproval of his claim, he would still have to go to the auditing department, in which the action of the court is only advisory, or he might sue in the Court of Claims as shown in the case of *Clyde v. United States*, 13 Wall. *ubi supra*."

In *Redfield v. Windom*, 137 U. S. 636, it was stated, as the principle (p. 643)

"distinctly defined and strictly adhered to in a great number and variety of cases before this court,"

"that the writ of mandamus may issue where the duty,

which the court is asked to enforce, is plainly ministerial, and the right of the party applying for it is clear and he is without any other adequate remedy ; and it can not issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion."

And indeed, it was added :

"that, in the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act." (P. 644.)

The principles thus adjudged by this court in a number of cases, of which the three cited have been selected as merely typical, would have been fatal to an application for mandamus had it been attempted, for the following reasons.

The duty of the Secretary of the Treasury of prescribing regulations, although imposed, as we have contended, by mandatory provision of law, was in no sense merely ministerial. It involved in very large measure the exercise of executive judgment as to the particular regulations to be adopted. The framing of regulations under the pressure of a writ of mandamus would not have been a method well adapted to securing proper or judicious regulations.

The court granting the mandamus would have had to judge whether the regulations were reasonable and adequate to the purpose intended, and in order to make the remedy of any efficacy would have had also to superintend their execution. All this would be manifestly impracticable, as against unwilling officers.

The case is not analogous to that of the issuance of the writ to a court commanding it to give judgment on a case or some particular motion or proceeding therein.

In such a case the party has no other legal remedy, and must obtain the judgment of the court one way or the other as a preliminary to his remedy before a higher tribunal by appeal or otherwise. *Ex parte Russell*, 13 Wall. 664; *Ex parte Roberts*, 15 Wall. 384; *Ex parte United States*, 16 Wall. 699; *Ex parte Flippin*, 94 U. S. 350; *Ex parte Railway Co.* 101 U. S. 720; *Ex parte Burtis*, 103 U. S. 238; *Ex parte Morgan*, 114 U. S. 174. But this rule has never been extended to the executive departments, against the officers of which the writ of mandamus can never be issued except to command the performance of purely ministerial acts.

In *Boynton v. Blaine*, 139 U. S. 306, the court said (p. 319):

"The writ of mandamus can not issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 644. When by special statute, or otherwise, a mere ministerial duty is imposed upon the executive officers of the government; that is, a service which they are bound to perform without further question, then if they refuse, the mandamus may be issued to compel them."

In the subsequent case of *In re Emblen*, 161 U. S. 52, the Assistant Attorney-General, arguing the case for the respondents in the writ, thus stated the distinction (*Lawyers' Co.-Op. Ed. Book 40, p. 615*):

"In the appellate jurisdiction over inferior courts, court officers, etc. there is no rule confining mandamus to ministerial acts; it is commonly used to compel the performance of duties involving discretion, exercise of discretion being *directed, but not controlled*.

But executive discretion can be *neither directed nor controlled*."

And the judgment of the court was adverse to the granting of the writ on this very ground. This principle would specially apply in a case like this, where it is not a single act to be performed, but a series of acts, all involving judgment and discretion.

### **A Mandamus Necessarily Futile.**

In the letter of the Commissioner of Internal Revenue of October 3, 1894, to the Secretary of the Treasury (Rec. 7), he says that it has been found impossible to prepare regulations without official supervision and asks whether there is any money appropriated for this purpose. The Secretary, on October 5 (Rec. 7) answers him that there is no appropriation. On the same date (Rec. 8) he writes the Secretary that, in view of the fact that there is no money for supervision, regulations should be delayed until Congress provides a fund, and the Secretary replies October 6 (Rec. 8), that he has considered the subject and that until further action by Congress it is not possible to make and enforce regulations.

If a mandamus had been applied for, the relator could only have prayed that the Secretary should make regulations, as required by the law. If granted, he thereupon would have prescribed a series of regulations and would in consistency have been bound (as he had said that effective regulations could not be made without supervision) to require supervision. This would have needed money and he had already decided that there was no available appropriation. A second mandamus proceeding would then have been requisite to command him to pay the expenses out of existing appropriations. But no court would issue a mandamus to control the Secretary in his use of the money in the Treasury appropriated by Congress for the expense of the Internal Revenue Bureau. While it is clear

that he had a right to use these appropriations for the purpose of enforcing such regulations, it is a matter peculiarly of executive control to what particular uses funds shall be put when claimed to be inadequate for all the purposes appropriated for. The principle is well settled that mandamus will not lie to compel the payment of money for a specific purpose from the Treasury. *Decatur v. Paulding*, 14 Pet. 497; *Reeside v. Walker*, 11 How. 272.

Consequently, after having secured regulations from the Secretary, the claimant would be in exactly the same situation as before. These regulations would have required supervision, the Secretary would have refused to carry them out in the absence of any appropriation by Congress, and the courts would not have interfered to oblige the Secretary to use money which he said was not available for this specific purpose.

### **No Mandamus Because Another Legal Remedy Existed.**

The appellant had another specific legal remedy,—viz., the one here pursued, a suit in the Court of Claims. This is fatal to the right to a mandamus, which exists only where there is no other adequate legal remedy. This was one ground upon which this court acted in denying the writ in one of the very cases just cited, that of *Redfield v. Windom*, 132 U. S. 636. The relator in that case afterward adopted the very remedy pointed out to him by this court, sued in the Court of Claims, and recovered judgment (*Redfield v. United States*, 27 C. Cls. 393).

If, too, as we have throughout contended, the refusal of the Secretary of the Treasury to make proper regulations for the execution of this law, of itself constituted a breach of contract between the government and the manufacturers for the re-payment of the tax to such as should use alcohol, the responsibility of providing such regula-

tions was entirely upon the government. It is not incumbent upon a manufacturer desiring to avail himself of the benefits of the law to see that the government should carry out by its appropriate officers the duty imposed upon those officers more for the protection of the government than for the benefit of the manufacturer.

### **No Mandamus Because of the Interest of Other Parties.**

In *Redfield v. Windom*, 137 U. S. 636, 644, it was said that the writ would be refused

"in a case where the relator having another adequate remedy, the granting of the writ may in this summary proceeding affect the rights of persons who are not parties thereto."

The granting of the writ at the instance of this one particular manufacturer would have compelled the Secretary to make general regulations applicable to the cases of all manufacturers who might desire the benefit of this law, many of whom were engaged in wholly different branches of industry, who were not, and could not become, parties to the suit, and whose rights would thus be determined without a hearing. In such a case, the remedy for individual wrong is an individual action under the statute.

## **XI. ALCOHOL PRODUCED BEFORE AUGUST 28, 1894.**

By Finding III (Rec. 5), it appears that of the \$7,244 tax paid on the alcohol in question, \$2,344 was paid at the rate of ninety cents a gallon, the rate fixed by act of March 3, 1875 (1 Supp. R. S. 70, 18 Stat. L. 339), and therefore prior to August 28, 1894, the date of the act under which this claim arises. By § 48 of this act (2

Supp. R. S. 325, 28 Stat. L. 563), the tax was increased to \$1.10 a gallon. The tax was paid at this rate upon the remainder of the alcohol used, amounting to \$4,900. It was contended by counsel for the United States in the court below that a recovery, if at all, can only be for the latter amount.

### **No Discrimination in the Act.**

The act itself makes no such discrimination. A rebate is to be paid upon the delivery of the stamps which "show that a tax has been paid thereon," and the rebate is to be "of the tax so paid."

The rebate is promised to the manufacturer who uses the alcohol upon his showing that a tax has been paid thereon. To support the defendants' construction it would be necessary for the claimant to be required by the statute to "show that a tax has been paid thereon since August 28, 1894," to entitle him to the rebate. This construction requires the importation into the statute of words not expressed and in no degree implied. It rests neither upon the terms of the statute nor upon sound reason.

### **The Intent of Congress.**

The intent of Congress is clear. Alcohol has since 1862 been subjected to a heavy burden of taxation, based upon its use as a beverage. With the view of freeing alcohol in the arts from taxation, Congress provided that all persons so using it should be entitled to a rebate equal to the entire tax paid, upon exhibition and delivery of the stamps showing payment. No mention was made of the amount of tax paid—Congress evidently contemplating that whatever may have been the amount paid, the alcohol employed in the manner described in the act should be free of tax.

### **The Contract with the Manufacturer.**

It was argued below that as no contract for repayment of the tax existed until August 28, 1894, no right to rebate accrued when the tax was paid before that date. This is an essential misapprehension of the contract. There is no contract between the distiller, who is the original tax-payer, and the Government. The contract is between the Government and the manufacturer who uses the alcohol. The promise is that, if he uses alcohol in the arts, he shall receive a rebate of the tax. The material date is that of the use of the alcohol in the arts and not of the payment of the tax. If used after August 28, 1894, no matter when the tax was paid, the Government has agreed with the manufacturer to refund the tax.

### **Is the Act Retrospective?**

The construction now contended for is in no just sense retrospective. A recent able work, "*Black on Interpretation of Laws*," p. 247, thus defines a retrospective law:

"A retrospective law is one which looks backward or contemplates the past; one which is made to affect acts or transactions occurring before it came into effect, or rights already accrued, and which imparts to them characteristics, or ascribes to them effects, which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence."

Authorities are cited in support of this definition, and it is said:

"A statute can not properly be called retrospective merely because a part of the requisites for its operation may be drawn from a time antecedent to its passage."

Even if the construction herein contended for be retrospective it would not follow that it is for that reason



alone to be rejected. The Constitution contains no inhibition upon the passage of retrospective laws by Congress where they do not make an act criminal which was not so before the passage of the act, or deprive any person of his property without due process of law. The courts often give a retrospective construction to statutes that disturb no vested rights. *Hawkins v. United States*, 19 C. Cls. 611; *McNamara v. United States*, 28 C. Cls. 416.

### **Precedent.**

In an opinion of the Attorney-General of April 19, 1895 (21 Opinions, 159), it is held that the provision of the copyright act of March 3, 1891, that during the existence of the copyright the importation into the United States of the copyrighted book shall be prohibited, is not confined in its application to books copyrighted since the passage of the act, but extends to all books lawfully copyrighted, whether before or since the passage of the statute. The following reasoning (p. 161) is fully applicable to the question now before the court :

"Does this apply only to such books as shall have been copyrighted since March 3, 1891? I think not. It secures to the owner of the copyright of every book which shall have been copyrighted in accordance with the requirements of this statute, whether before or after its passage, protection against the sale in this country of foreign publications of his book by prohibiting the importation of such foreign publications. The act is prospective only as to this new security which it affords to the owner of the copyright, and is not prospective as to the books to which that security applies.

"He can not claim indemnity for losses sustained by reason of such importation and sale prior to the passage of the act; but while his copyright continues, whether it was acquired before or since March 3, 1891, the benefit of the act extends to him.

"Neither the letter, the spirit, nor the reason of the act confines the application of the protection it affords to those books that have been copyrighted since its passage.

"Tariff laws are prospective. But an amended statute which places on the free list certain articles theretofore subject to duty is not limited in its application to those articles of that class which have been produced or manufactured since the passage of the amendatory act."

### **Consequences Illustrated.**

To put the question in a concrete form will show the illogical consequences of a different construction of the act. Let us suppose that two manufacturers in the same line of business (say the manufacture of hats) on the day after the passage of the act purchased the same quantity of alcohol and used it in precisely the same manner. One purchased alcohol upon which the tax had been paid prior to August 28, 1894, of ninety cents a gallon. The other purchased alcohol which may also have been fully produced prior to August 28, 1894, though not taken out of bond till the day after, upon which the tax of \$1.10, as provided by the new law, had been paid. The new rate of tax took effect upon all alcohol upon which the tax had not already been fully paid, though already produced and in bond. Of these two manufacturers, though both might have paid precisely the same price for the article, one, according to the theory suggested, would be entitled to a rebate of \$1.10 a gallon on the alcohol used by him, while the other, upon whose goods a tax of only 90 cents had been paid, would be entitled to nothing at all. According to this theory, the government would save not merely the difference of twenty cents a gallon in the tax by a manufacturer using alcohol upon which the tax had been paid before August 28, 1894, but the entire amount of the rebate. Surely a theory leading

to such an absurd consequence can not be correct, especially when it would involve a strained construction of the very terms of the act.

On the contrary, every consideration of sound reason is entirely in favor of the opposite construction. If a manufacturer, on August 28, 1894, had on hand alcohol upon which a tax had already been paid, it was to the advantage of the Government that he should use this and secure a rebate upon it at the rate of ninety cents a gallon rather than purchase alcohol upon which the tax had been paid after August 28, 1894, and secure a refund of one dollar and ten cents a gallon. The position assumed by counsel for the United States would have obliged him to sell all such alcohol in his possession and buy a new stock. Then he could obtain from the Treasury twenty cents a gallon more than if he had used his original stock.

In this case it is readily supposable (though the record does not expressly show it) that the claimant did not buy this alcohol until after August 28, 1894. To declare his entire rebate forfeited because he did not purchase alcohol upon which the United States would have been obliged to pay twenty cents a gallon more rebate would violate the principle laid down by this court in *United States v. Kirby*, 7 Wall. 482, 486, 487 :

“General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.”

## XII. CONCLUSION.

The importance of the case, the number of subjects discussed in the opinion below and the earnestness of the defense interposed by the Government have justified a

more elaborate argument than might otherwise have seemed necessary.

The single question before the court is whether freedom from tax granted by Congress can be defeated by executive inaction.

The courts have uniformly decided that this can not be done. The Court of Claims finds in the language of this statute a difference from that used in all others judicially interpreted sufficient to warrant a departure from this principle. The appellant insists that there is nothing in the language differing in any essential from that used in statutes already interpreted; that the purpose of Congress is clearly expressed and should not be defeated by straining the verbal construction to disregard the legislative intent, and that the case must be decided in accordance with the previous decisions of this court, protecting the citizen freed from tax by Congress from taxation by the uncontrolled exercise of executive will.

GEORGE A. KING,

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*Of Counsel.*

## APPENDIX.

*Letter of David A. Wells, formerly Special Commissioner of the Revenue, in relation to the effects upon the use of alcohol in the arts and manufactures of the imposition of a tax upon distilled spirits.*

NORWICH, CONN., October 11, 1887.

DEAR SIR: I am in receipt of your note of October 8, requesting me to communicate to you any information I may have in respect to the percentage of distilled spirits used in the arts at the present time in the United States. I regret that I am not able to communicate any information of value relative to the present condition of affairs, although formerly when special commissioner of the revenues, I gave much attention to the subject.

Prior to the imposition of any taxes on distilled spirits, or before the war, I am of the opinion that at least 33 per cent of the whole product of the country, which in 1860 was probably about 90,000,000 proof gallons, was consumed in the arts and industries. In support of this conclusion I would ask your attention to the following extract from a report of the result of my investigations (as United States special commissioner of revenue on this subject), which I have heretofore published, showing somewhat in detail the extent and character of the consumption of distilled spirits in the United States for industrial, medicinal, and art purposes prior to 1860, and the effects of subsequent high Federal taxation in curtailing or absolutely preventing such consumption.

For a period of nearly a half century previous to 1860 the manufacture of spirits in the United States had been free from all specific taxation or supervision by either the National or State Governments, and being produced mainly from Indian corn, at places adjacent to the localities where this cereal was cultivated, and to

a large extent also from corn that was damaged and so otherwise unmarketable, was afforded at a very low price, the average market price in New York for the four years next preceding 1862 having been about 23 cents per proof gallon, with a minimum price during the same time of 14 cents per gallon. In Cincinnati the market price of whiskey for August, 1861, was commercially reported as "closing dull" at 13 cents per gallon. The price of alcohol in New York during the period above noted ranged from 40 to 60 cents per gallon. Under such circumstances the consumption of distilled spirits in the United States previous to the war for a great variety of purposes, had become enormous, affording a practical illustration of the curious varying relations between prices and consumption, and also of what may be considered in the light of an axiom in political economy, namely, that practically there is almost no limit to the consumption of any useful commodity, provided that through a reduction of cost or price it is brought within the purchasing power of those who desire to consume.

Thus for the year ending June, 1860, the product of distilled spirits in the United States as returned by the census, was 89,308,581 gallons (proof spirits), or, including alcohol, 90,412,581 gallons, and this aggregate, subsequent investigations proved, was considerably less, rather than in excess of the actual production. The maximum quantity of domestic distilled spirits exported in any one year previous to the war was never in excess of 3,000,000 gallons, so that the annual consumption of domestic spirits in the United States in 1860, for all purposes, was at the rate of nearly 3 gallons for every man, woman, and child of the population.

It would be an error, however, to assume that all of this immense production of spirits was used for intoxicating purposes or in the way of stimulants, inasmuch as the extreme cheapness of proof spirits and of alcohol in the United States at the period under consideration occasioned their employment in large quantities for various purposes which were absolutely or almost unknown in Europe, where the price of these same products,

through the fiscal necessities of the various governments, has always been made so artificially high as to greatly limit their industrial application. Thus one of these employments, peculiar to the United States at this time, was the manufacture of a cheap illuminating agent known as "burning fluid," composed of one part of rectified spirits of turpentine mixed with from four to five parts of alcohol, each gallon of alcohol thus used requiring 1.88 gallons of proof spirits for its manufacture. The use of this preparation in the United States in 1860 in places where coal gas was not available was all but universal, and necessitated a production and consumption of at least 25,000,000 gallons of proof spirits per annum, which in turn would have required the production and use of from 10,000,000 to 12,000,000 bushels of corn. And so extensive was the scale on which its manufacture was conducted that in Cincinnati alone the amount of alcohol required every twenty-four hours for this industry was equivalent to the distillate of 12,000 bushels of corn. Here, then, had been gradually created a new, peculiar, and large market for one of the staple products of American agriculture and also for the peculiar product—turpentine—of mainly one agricultural State, North Carolina.

The excessive cheapness of alcohol also led to its most extensive use for fuel in manufacturing and in domestic culinary operations, for bathing and cleaning, for the manufacture of varnishes, vinegar, imitation wines, flavoring extracts, perfumery, patent medicines, white lead, percussion caps, hats, photographs, tobacco, and a great variety of other purposes. It is also to be noted as a curious part of this history that nearly all preparations washes and dyes for the hair, which at that time in other countries—as now almost universally—were prepared almost exclusively on a basis of fats or oils or some non-spirituous liquids, were in the United States then composed almost wholly on a basis of alcohol, the comparative difference in the price of this article in the United States and Europe giving an entirely different composition to a product of large consumption intended to effect a common object. The transcript of the sales of a single distillery

and rectifying establishment in New York City, put in as evidence before the United States Revenue Commission in 1865, showed sales in a single year of 19,040 gallons of alcohol in one case and 12,657 in another to two manufacturers of different popular hair washes and tonics. From the same firm a manufacturer of an "extract of sarsaparilla" bought in one year 81,300 gallons, and another manufacturer, who made a "pain killer" 41,195 gallons. A single firm of patent medicine proprietors in Massachusetts testified their consumption of distilled spirits to have averaged 100,000 gallons per annum, while another in western New York, engaged simply in the manufacture of a horse medicine, reported a consumption, prior to the imposition of internal revenue taxation, of upwards of 50,000 gallons of proof spirits annually. Individual hair dressers in the large cities also testified that the use of 400 gallons of alcohol (equal to 750 gallons of proof spirits) yearly in their local business was not an unusual circumstance.

For the manufacture of imitation wines the demand for distilled spirits in the United States prior to 1864 was also very large, four firms in the city of New York reporting a consumption of 225,000 gallons of pure spirits for this purpose during the year 1863. Large quantities of neutral or pure spirits were also used at the time in the United States for the "fortifying" of cider, to prevent or retard acidification, especially in the case of cider intended for export to tropical countries, to the Southern States, or to the Pacific. One distiller in western New York reported a regular sale, during the year 1862, of 8,000 gallons per month for this purpose exclusively.

The first tax imposed by Congress on distilled spirits of domestic production was 20 cents per proof gallon, and went into effect on the 1st of July, 1862. This tax continued in force until March 7, 1864, when the rate was advanced to 60 cents per gallon. On the 1st of July, less than four months subsequently, the rate was again raised to \$1.50 per gallon, and on the 1st of January, 1865, six months later, it was further and finally advanced to \$2 per gallon. In addition to these specific taxes



heavy additional taxes on the mixing, compounding, and wholesale and retail dealing in spirits were also imposed in the way of licenses.

The immediate effect of this imposition and rapid increase of internal taxes upon distilled spirits was a series of industrial and commercial phenomena, more remarkable than anything of the kind before recorded in economic history; and yet so completely was the attention of the American people engrossed at this time in other and greater events—events affecting their very existence as a nation—that the results referred to did not so much as create a ripple in public opinion, and were barely adverted to, if noticed at all, in the columns of the public press. In short, the influence of these taxes was to entirely and rapidly revolutionize great branches of domestic industry, and in some instances to utterly destroy them. Thus, for example, the manufacture of burning fluid entirely ceased, inasmuch as the rise in the price of alcohol from 40 cents to \$4 and upwards per gallon, together with the cessation of the supply of turpentine from North Carolina—then a State in rebellion—rapidly converted it from the cheapest to the dearest of all illuminating agents. Here also, very curiously, the public did not experience any great inconvenience by reason of this change; for by one of those happy and unexpected occurrences, almost in the nature of accidents, which have so often characterized the history of the United States, and which some are pleased to regard as “special providences,” it so happened that the discovery of vast and natural supplies of petroleum in Pennsylvania, and the practical application of its distillates for illuminating purposes, was almost coincident in point of time with the compulsory disuse of burning fluid; while the fact that the new material possessed great advantages in point of cheapness and effect over the old caused the change in popular use to be effected voluntarily and with great rapidity. As a further illustration of the compensations which invariably attend the losses immediately contingent upon industrial progress, and through the disuse of old products, methods, and machinery, it may be stated that, although the manufacture of burn-

ing fluid ceased, the business of collecting, preparing, and exporting petroleum rapidly became one of the most important in the country; while the demand at home and abroad for the lamps and their appurtenances devised and adapted in the United States for the use of the distillates of petroleum was alone sufficient to employ the entire manufacturing capacity of all the glassworks of the country for a term equivalent to two entire years.

Druggists and pharmacutists in the United States estimated the reduction in the use of alcohol in their general business, consequent upon its increased cost from taxation, at from one-third to one-half. The popular hair preparations into which alcohol entered largely as a constituent vanished from the market; and the manufacturers of patent medicines and cosmetics generally abandoned their old preparations and adopted new ones. The manufacturer of horse medicines, who used 50,000 gallons of spirits in 1863, woefully testified in 1865 that his business was destroyed. Varnish makers, who, when alcohol could be purchased at from 50 to 60 cents per gallon, used it in large quantities, were of necessity compelled to entirely or in a great degree abandon its use when the price rose to \$4 per gallon and upward; and yet special investigation showed that the quantity of varnish manufactured was not correspondingly reduced, inasmuch as the manufacturers at once substituted other and cheaper solvents for their gums, especially the naphthas or light distillates of petroleum which were then opportunely seeking uses and a market. Within a comparatively few years, also, the continued high price of alcohol has led the manufacturers of quinine to substitute the distillates of petroleum as a solvent for the alkaloïds in the cinchona barks, and with such success that it is doubtful whether the old processes would be again adopted, even if alcohol could again be afforded at its former prices. The manufacturers of hats, who had before used a composition of gum-shellac dissolved in alcohol almost exclusively for stiffening the hat "bodies" or "foundations," and were thus large consumers of alcohol, were compelled to abandon its use, and for a time were subjected to no little inconvenience. But even here

substitutes were soon found, and in addition to the use of cloth as a material for hats in the place of felt and silk, plush was largely introduced and became popular. The manufacture of vinegar from whiskey, by reason of the great advance in the price of distilled spirits, was also in a large degree broken up, and this in turn had the effect to destroy a large export business of this article, as well as to increase the market price of pickles to the extent of from one-third to one-half, and also to seriously affect the manufacture and cost of white lead, and occasion extensive importations of this article from other countries.

The business of fortifying cider for movement or export to the Pacific coast and to the tropics before referred to, as well as the manufacture of imitation wines and of cheap perfumery, was likewise very seriously interfered with or destroyed, as was also the business of manufacturing the fluid extracts of the medicinal principles of plants; and it was represented to the revenue commission by members of the American Pharmaceutical Association that there was a marked tendency throughout the country on the part of physicians and others to abandon the use of alcoholic extracts and fall back upon the old custom of employing crude drugs, decoctions and sirups as substitutes; and further that there was an attempt to keep down the price to the consumer of many official preparations which absolutely required the use of alcohol by putting them up at less than their proper official strength, thus inflicting a sanitary injury upon the whole community. Finally, in all branches of the industrial arts, where the continued use of distilled spirits was indispensable and no cheaper substitute could be found, the utmost economy in its use was everywhere practiced.

Another curious incident connected with this history was that the curators of the leading museums of the country—anatomical or natural history—attached to institutions of learning, memorialized Congress to the effect that, owing to the high price of alcohol they could not afford to make good the waste of this substance (by evaporation and leakage) as employed by them for scientific purposes; and that in consequence many important col-

lections were becoming greatly impaired in value, and the progress of scientific discovery and research greatly impeded. And Congress, recognizing the desirability of giving relief in respect to this matter, empowered the Secretary of the Treasury to grant permits to incorporated American institutions of learning to withdraw spirits from bond in specified quantities for scientific purposes without payment thereon of the internal revenue taxes.

My opinion now is that not more than 10 per cent as a maximum, of the present product of distilled spirits in the United States is used for industrial, artistic, or medicinal purposes.

If the present tax of 90 cents per proof gallon could be reduced to 50 cents, the rate established from 1868 to 1872, I have no doubt that the use of alcohol for industrial and medicinal purposes would be very largely increased, cheapening many manufactured products, enlarging the market for the same both at home and abroad, and without occasioning any material reduction of the national revenues.

I am, yours, most respectfully,

DAVID A. WELLS.

MR. WILLIAM F. SWITZLER.

P. 218.

Reply By of King, King & Co.  
for Appellant

Filed Nov. 28, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 218.

ROBERT DUNLAP, *Appellant*.

THE UNITED STATES.

Brief in Reply.

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S. L. MCGOWEN, Printer.

IN THE  
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**BRIEF IN REPLY.**

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The brief for the United States discusses comprehensively all the issues involved in this case. On most of these questions the views of counsel for the appellant have been already laid before the court in their opening brief. Only the following positions seem now to require special reply :

1. That "regulations were to be prescribed before any right to rebate could exist" (p. 9) and that "the statute itself postpones the existence of the right until the Secretary of the Treasury has performed the act called for by the statute, viz., the prescribing of regulations" (p. 39).

2. That the act contemplated constant official supervision (pp. 18-20), and by its omission of any appropriation to pay the necessary officers (p. 63), the vagueness of its definition of terms (p. 48), and the dangers of fraud (pp. 23, 50-53), was necessarily inoperative till such a corps of officers were appointed and in the performance of their duties (p. 10).

3. That, the Secretary of the Treasury having reported that "he could not execute the section until Congress took further action" (p. 25), and Congress having taken

"no steps to require the Secretary to entertain such claims is conclusive proof that Congress had originally intended that unless the Secretary "prescribed regulations "no claims for rebate should be entertained" (p. 26).

4. That no rebate can be paid on alcohol on which the tax was paid prior to August 28, 1894 (pp. 104-111). We shall submit our views on these four propositions in their order, and in addition a few observations of a miscellaneous character.

### **1. The Act Took Effect Immediately.**

The Government insists (brief, p. 9) that "regulations were to be prescribed before any right to rebate could exist," that (p. 10) the Secretary "would have been allowed a reasonable time before he could be called on to prescribe the regulations"; that (p. 11) "until the regulations had been prescribed, no right to rebate arose" and consequently that "as the regulations never were prescribed, there never was any right to rebate at all."

The fallacy of this argument consists in assuming that officers of the Government when required to take steps to carry out a statute are entitled to an indefinite time for their action. The argument is at war with every principle of statutory construction.

No doubt it is in many cases more convenient, that statutes should take effect at a future day rather than immediately. The constitutions of many States provide that, except in particular cases, statutes shall take effect only a certain time after their enactment. Although no such restrictions bind Congress, it is not unusual for an act of Congress to provide that it shall go into effect at some future date. This is particularly true with regard to revenue laws. Thus, the revenue act of March 3, 1883, 22 Stat. L. 488, provided that those portions relating to internal revenue should go into effect on the

following first of May, and those in regard to customs on the first of July, thus giving about two months of time for preparation for the former and four months for the latter. There could be no question of the duty of the Secretary of the Treasury to have all regulations required by that act put into execution on the respective days named.

The fact that the time actually given for putting the act into effect is very short forms no reason for postponing its operation.

Thus, the next general revenue act, that of October 1, 1890, 26 Stat. L. 567, by express terms went into effect on the sixth of October, 1890, only five days from its passage. Notwithstanding the shortness of time allowed it was never claimed that either officers or citizens were entitled to more to prepare for its going into operation.

The act of August 28, 1894, under which the present claim arises, provided in terms that its tariff provisions should go into effect on the first of August, 1894. It did not become a law till the 28th of that month. It was held (*United States v. Burr*, 159 U. S. 78) that it went into effect only on that day. The only question was whether the act went into effect on the 1st of August or on the 28th. There was no contention that it was intended to take effect only on a future day, although an examination of the journals of the two Houses led this court to the conclusion that the purpose at each legislative step had been throughout to fix a date after its passage for its operation.

The fallacy of the argument for the United States consists in assuming that, in the absence of a specified future date for the taking effect of this act, the officers of the Government were entitled to take their own time about putting any of its provisions into effect. No such question could have been raised if the act had followed the



usual course of revenue acts, and had provided for taking effect at some future date. The argument is thus seen to be a mere argument *ab inconvenienti*. No such inconvenience actually occurred in regard to this act. It was held by the President for the constitutional limit of ten days. During this time the Treasury Department had an opportunity to prepare for putting all its provisions into effect.

Citizens have never been excused from paying duties at increased rates going into immediate operation because time was not granted them to adjust their business relations to the new state of things. Why should officers of the Government be entitled to any different rule?

### ***Can the Law be Limited by the Executive?***

The argument for the Government is that there can be no recovery under this act without regulations.

The claimant has pointed out that the effect of this position is to place the taxpayer entirely under the control of the Secretary of the Treasury—he being charged with, or free from, tax according to the Secretary's discretion.

Accepting the logical consequences of the position that the purpose of Congress was that there should be no recovery unless the alcohol had been used under regulations, it would make no difference whether the Secretary disobeyed the law in full by failing to prescribe regulations; whether he prescribed unreasonable regulations; or whether, after prescribing lawful regulations, he failed to carry them out or revoked them. This court in the *Campbell* case treated these conditions as identical.

The regulations proposed by the Secretary but never promulgated (Record, p. 10, article 1) defined a manufacturer as one who "manufactures for wholesale only." It is admitted by the United States (brief, p. 49), that

this definition was unduly restrictive. Not appearing by the findings to be a manufacturer "for wholesale only," this claimant would have been excluded by this regulation.

Had these regulations been prescribed, and this claimant had demanded the benefit of the law, his application would have been refused by the Treasury Department. A bond would not have been accepted under article 7 (p. 13); inspection would have been refused under article 12 (p. 15); license would not have been granted under article 14 (p. 16), and no officer would have been assigned under article 19 (p. 17). In other words, this claimant, though confessedly within the scope of the law, could not have conducted his manufacture under regulations, although regulations had been prescribed. He would therefore have presented himself before this court, as he does now, and would have been met by exactly the same argument, possessing the same force, that he could not recover because the alcohol was not used under regulations.

This would have presented the precise parallel of the case of *Morrill v. Jones*, 106 U. S. 466, where the party brought himself within the law but remained outside the regulations. It was held that he was entitled to recover. Are the rights of the claimant in this case any weaker because the Secretary of the Treasury has attempted to exclude from the benefits of the law not merely a part, but the whole, of the class defined by its terms?

Either the right rests on the law, subject to such lawful regulations as are made, or is in every respect dependent on the use under regulations. Yet it is seen that to hold to the latter, would put into the hands of the Secretary the unlimited power to tax or not to tax according to his own limitations and definition. This leads to the con-

clusion that the grant by Congress was complete and that the meaning of the words "under regulations" is "subject to regulations." If lawful regulations are prescribed, they must be complied with. If not prescribed, the claimant proves the facts required by the law, there being no regulations to follow, and is entitled to recover.

***Authority Cited for the United States.***

The appellant's opening brief (p. 54) called attention to the noteworthy fact that all the decisions, six in number, cited by the Court of Claims, were against the power, sustained by that court, of an executive officer, charged with making regulations, to make the statute ineffective by failing to make or enforce regulations. The Court of Claims held that this statute was without precedent. The evident need of one to support the decision is met by the Attorney-General by saying that (p. 12) "this court has more than once ruled upon such a provision," and by citing a single case,—*United States v. McLean*, 95 U. S. 750.

That case has no application to this for the following reasons:

1. The right before this court in the *McLean* case was a right to salary as postmaster. Such salaries have always been to a large extent under the control of the Postmaster-General. They are part of the postal administration. At the present day, with the exception of the salaries of the postmasters at New York and Washington, the salary of every postmaster in the United States is fixed by the Postmaster-General (act of March 3, 1883, 1 Supp. R. S. 417, 22 Stat. L. 600).

The subject matter of the present case is of an entirely different nature. It is one always reserved to the legislative power—the right of taxation. The jealousy with which this right is guarded from executive encroach-

ment is fully discussed in appellant's opening brief (pp. 56-63).

2. The language of the statute (brief for United States, p. 12) in express terms made the right to the increased salary dependent upon a readjustment by the Postmaster-General.

This is quite different from the language of the statute in the present case, which expresses no such intention, but merely gives a direction to the Secretary of the Treasury to prescribe regulations for enforcing the right granted by the statute.

3. The decision in *United States v. McLean* loses its authority in the light of later cases under the same statute. The Attorney-General insists that in that case this court held that there was no right of action for the salary, which ought to have been fixed by the readjustment of the Postmaster-General, although his duty was of computation alone, involving no discretion. But in the subsequent case of *McLean v. Vilas*, 124 U. S. 86, the case was examined on its merits, and it was held that the law in express terms vested discretionary power in the Postmaster-General as to fixing the salary; thus overruling the position taken in the original *McLean* case, that whatever may have been the claimant's right to a readjustment, he was without remedy, even though the duty imposed upon the Postmaster-General was mandatory.

The subsequent decision in *United States v. Verdier*, 164 U. S. 213, was also to the effect that the fixing of this salary was intended to be discretionary with the Postmaster-General. It was said (p. 216):

"It would seem that no readjustment could then be made until the lapse of two years, or until July, 1868, unless, upon satisfactory representation, it was deemed expedient by the Postmaster-General."

Again, referring to *United States v. McLean*, it was said (p. 220):

"In that case, as stated by Mr. Justice Miller in *McLean v. Vilas*, 124 U. S. 86, 87, this court held that the Court of Claims could not 'perform the duty of readjusting the salary under the acts which conferred that power on the Postmaster-General, and that there was no legal liability against the United States for the amount claimed by him until that officer had readjusted the salary in accordance with those acts of Congress'; and in *McLean v. Vilas* it was held that the statute did not contemplate a readjustment oftener than once in two years as a legal duty or obligation on the part of the Postmaster-General."

It is thus seen that the statutes in those cases and in this are very different. There the duty of readjustment was discretionary. Here the duty of prescribing regulations is mandatory.

4. The decision in *United States v. McLean* was not only departed from in the later cases, but was itself made with apparent regret at the time. It was said in the opening of the opinion (95 U. S. 751):

"The case of the claimant appears to be a hard one; but we think he has no remedy by suit in the Court of Claims."

For these reasons this doctrine should not be extended beyond cases not clearly covered by its terms, especially into branches of governmental law, where it meets the opposition of settled principles of constitutional construction.

### ***Inoperative Statutes.***

These constitute a new class, hitherto unknown to legal terminology. But, as the Attorney-General has insisted that this is such a statute, and has cited three

instances claimed to be in point (pp. 98-103), we shall discuss them in their order.

In the case of *Dunwoody v. United States*, 143 U. S. 578, powers had been conferred upon the National Board of Health; but acts subsequently passed in express terms limited the powers of that board to the expenditure of money expressly appropriated for it. This court said (p. 586):

"That made by the act of March 3, 1881, for 'salaries and expenses' of the board, was accompanied by a direction that no more money should be expended for the purposes of the various acts creating it, out of any appropriations previously made, or by virtue of any previous law; and the act of 1882 expressly provided that 'no other public money than that hereby appropriated shall be expended for the purposes of the Board of Health.' These enactments evince the purpose upon the part of Congress not to create any liability upon the part of the United States, in respect to the work of the National Board of Health, beyond the amounts specifically appropriated by it from time to time for that work."

This decision, far from constituting authority for the position that the enforcement of a law is dependent upon appropriations holds that it is so dependent only when Congress expressly so enacts. In that case Congress had provided that the liability of the Government should be limited to appropriations thereafter made. The decision simply carried out the purpose thus expressed.

The Civil Service Act of March 3, 1871, 16 Stat. L. 514, authorized the President to prescribe regulations for admission into the civil service of the United States, and to employ suitable persons to conduct inquiries. It may be that the powers of the President were not as effectively exercised as they would have been had Congress continued to appropriate to carry it out. An act construed as the Attorney-General did this (13 Opinions

of Attorneys-General, 516) to be mainly for the purpose of properly informing the conscience of the appointing power to be properly informed—a purpose essentially discretionary—is widely different from a revenue law conferring upon the citizen the right “to receive from the Treasury of the United States a rebate or repayment” of a particular tax. It is unnecessary, however, to discuss that question with much detail, as that act was never brought to the test of judicial decision, and, therefore, the question whether it could or could not have been carried out without an appropriation for the purpose is a mere moot question.

As to the act of March 5, 1888 (25 Stat. L. 44) providing for the purchase of certain land and the buildings thereon, but for the payment of which no appropriation was made until April 24, 1888 (25 Stat. L. 90), the brief for the United States quite misapprehends the purport of the opinion of the Attorney-General (19 Opinions, 131), rendered after the passage of the former, but before that of the latter act. That opinion carefully refrains from holding the act inoperative. It directed the purchase of certain buildings and ground for a special purpose, but did not appropriate the purchase money. An act already in force, that of August 7, 1882, (1 Supp. R. S. 380, par. 1, 22 Stat. L. 305) provided:

“That no act passed authorizing the Secretary of the Treasury to purchase a site and erect a building thereon shall be held or construed to appropriate money unless the act in express language makes such appropriations.”

Under these circumstances the Attorney-General held, (p. 132):

“I am therefore of the opinion that no appropriation is made by the act of March 5, 1888, for the objects designated therein and that you are not authorized to pay

the sum specified in that act until such appropriation is made."

He carefully refrained from holding that the act was inoperative in the sense of not permitting the purchase. The purchase could undoubtedly have been made under the former act, and the vendor would by the promise of that act have acquired a valid and enforceable claim against the United States for the purchase money.

## **2. Would Numerous Supervisors have been Required to Prevent Fraud ?**

This question is quite immaterial, as we have pointed out in our opening brief (pp. 72-76), but the great stress laid upon the expense and dangers of fraud in executing regulations, in the brief for the United States (pp. 50-66), will excuse some consideration.

The act upon its face affords no warrant for the assumption that Congress regarded a large force, or any force whatever, of inspectors or other employees additional to those already in the service, as necessary.

It has been officially reported (Senate Report 1141, 54th Congress, 2d Session, p. 45) under the similar law in force in Great Britain :

"The attendance at methylations and subsequent supervision does not constitute the exclusive work of any officer. Ordinarily the officer has a multiplicity of other duties, and the supervision of the methylation, or of the use or sale of methylated spirits may form but an insignificant fraction of his work."

The statement of an experienced officer of inland revenue of that country in the same report shows that serious frauds were virtually unknown, and that such frauds as were attempted led to nothing more than occasional modifications of the system. There is no more reason for the apprehension of fraud in this country than abroad.



***The Burden of Proof on the Claimant.***

There is no analogy between the so-called whiskey frauds and anything which could be attempted under the system of free alcohol in the arts established by § 61 of the act of 1894. The frauds committed upon the revenue in times past consisted in the evasion of payment of taxes by those from whom they were due, and not in securing the repayment or rebate of a tax first paid into the Treasury. Under the system established by § 61 every safeguard provided by pre-existing law for the collection of taxes on distilled spirits remained in full force and effect. Every dollar of that tax was required to continue to reach the Treasury as before.

No consideration has been given to the particularly favorable position of the Government under § 61. The affirmative of the issue was entirely upon the claimant. After paying his tax, he could get no rebate except by complying with the regulations issued and by satisfying the collector of his use of the alcohol. The regulations might fix any degree of proof or call for any stringency in the methods of satisfying the collector, so long as not clearly unreasonable. The Government thus had the power, not only to enforce stringent regulations, but to require the most comprehensive and conclusive possible evidence of the use. The tax remained in the Treasury until the collector should announce his satisfaction with the proof presented. The act contemplated that the burden of proof should rest upon and be discharged by the manufacturer, and the regulations might have been so framed as to require the completest safe-guards at the expense of the manufacturer to take the place of costly official supervision. The reduction of the ratio of expenses by taking due advantage of this superior statutory position would have been enormous.

Neither was it contemplated that a separate corps of officers should execute § 61. All the existing agencies of the internal revenue would have co-operated, with resultant economy of administration.

Any one claiming the benefit of that section could secure it only by making application, submitting his books and papers to inspection, himself and all his employees to interrogation, and by allowing every step of the process of manufacture to be examined at any required moment by an officer of the Government.

The regulations to be prescribed by the Secretary of the Treasury, by any fair construction, may provide by what character and amount of evidence the use shall be established to the satisfaction of the collector. Both the rules of evidence and its construction and effect, when offered, are within the full control of the officers of the United States. No claim can be paid through executive instrumentalities without the approval of the collector of internal revenue, who must be guided at every step by regulations prescribed by the Secretary. In case of doubt, he may properly leave the claimant to his legal remedy by suit.

The frauds referred to in the brief for the United States (p. 21) all consisted in evading the payment of taxes. If the smuggler or the moonshiner can only escape observation, he is safe. But a claimant is in a different position. He must come forward into the light of day, and submit to the recognized tests of truth. He must present testimony, and submit himself and his books and papers to examination to any required extent. He has no privilege behind which he can shield himself, like a defendant or an unwilling witness. The slightest attempt at concealment or evasion arouses suspicion. If even a suspicion were aroused on the part of the collector, he could not be said to be "satisfied."

To say that collectors of internal revenue would regularly allow fraudulent claims under any regulations as to evidence prescribed by the Secretary of the Treasury would be as unjust to them as it would be inconsistent with the history of that department of the public service.

Other classes of claims have been examined for many years in the Internal Revenue Office and as to all such other classes of claims it was only a just tribute to the management of that bureau which was paid by the Court of Claims when it remarked in the case of *Sybrandt v. United States*, 19 C. Cls. 461, 467 :

"The law as it is, however, has been in operation many years, and as yet no report of maladministration has reached the ears of the public."

The same remark applies to investigation by judicial process. Even were it true, as here claimed, that there is a peculiar danger of fraud in claims affecting the use of alcohol, that fact is proper for the consideration of the officers of internal revenue, or, in case a judicial remedy is sought, of the courts. The very fact that the present claimant is before this court to-day with a finding by the Court of Claims of every fact made material by the statute, rendered after a judicial scrutiny, the thoroughness of which is evidenced by the fact that the case was before that court for nearly three years, is a sufficient answer to the idea that an elaborate system of inspection is absolutely necessary before the facts attending the use of alcohol under § 61 can be properly established.

***The Analogy Between Section 61 and the Customs Drawback Law.***

In the brief for the United States (pp. 34-37), a contrast is attempted between § 61 and the customs drawback law

contained in § 22 of the act of August 28, 1894, 28 Stat. L. 551. This is a re-enactment of § 25 of the act of October 1, 1890, (26 Stat. L. 617, 1 Supp. R. S. 862), and that was an extension, after thirty years of experience, of R. S. § 3019. The section provides for the allowance of drawbacks of customs duties upon imported articles entering into the manufacture in the United States of articles subsequently exported. Elaborate regulations have been made under this act by Articles 734 to 802 of the Customs Regulations of 1892, and modified from time to time. A manufacturer desiring benefit of drawback has to apply to the Treasury Department for a rating of the manufactured article. Samples of the article are submitted and the Treasury Department submits these to analysis, mechanical or chemical, as may be necessary, and determines a maximum rate of allowance based upon the minimum of the imported article necessary for the completion of a given quantity of the manufactured article to be exported. The collector of customs is thereupon ordered to admit this article to drawback at the rate fixed in the regulations specially applicable to it. No supervision of manufacture is exercised.

The manufacturer is obliged to show by affidavit of the importer, which is verified from the customs records, that a given quantity of the article upon which drawback is claimed was imported and sold by him. When the article is manufactured, the claimant for drawback gives notice to the Collector of Customs that he is about to export, stating how many packages and by what steamer, and the inspector of customs satisfies himself by inspection of the goods on the dock and by examination of the steamer's manifests, of the quantity of the goods exported. He also takes samples as requisite, and these are submitted to the customs authorities, who determine whether the samples are equal to the standard already prescribed.

The claimant also furnishes the evidence of persons actually engaged in the process of manufacture, showing the use of the foreign article in the domestic manufacture. If the proofs are satisfactory the drawback is paid at the rate originally prescribed by the Department.

Among the articles admitted to drawback (see Treasury Department circular 120, Division of Customs, August 1, 1896) are the following on which a drawback is allowed of the tariff duty upon the foreign alcohol specially imported for use in the articles manufactured for export.

Ayer's Cherry Pectoral and Sarsaparilla (p. 3).

Barry's Florida Water, Pain Relief and Tricopherous (p. 4).

Borine (p. 5).

Burnett's Extract of Lemon, Cochineal, and Essence of Jamaica Ginger (p. 6).

Celery Root and Rye Cordial or Celery Tonic (p. 6).

Fluid Extract of Witch Hazel (p. 11).

Fluid extracts (pharmaceutical preparations) (p. 11).

Maltine (p. 17).

Perry Davis' Pain Killer (p. 19).

Toilet Waters, cologne, Florida and others (p. 32).

Varnish (p. 32).

It needed only an adaptation of this system by the Internal Revenue Bureau to secure suitable regulations for the rebate of tax on alcohol under § 61.

An effort is made to show some difference between the object of regulations under this law and under § 61. Under the customs law, the claimant has to prove the use of the imported article in the manufacture and its export. Under § 61, he has to prove only its necessary use in the arts. In the one case, the object of regulations is to ascertain the quantity of the article used, its identity with the article imported and its exportation. In the

other it is the quantity of the alcohol used and its identity with that on which the tax shown by the stamps has been paid. In either case, the conditions of the right are fixed by the statute and the regulations are solely to furnish a means of ascertaining the facts. In the one case, it is admitted that, if lawful regulations fail to be prescribed or executed, the facts may be ascertained by a court. The same rule must be here applied.

### ***Statutes Against Fraud.***

It seems useless to extend this discussion caused by the argument for the Government that the section was intended by Congress to be inoperative because of the dangers of fraud in its execution. But we point out various penal statutes of the United States which would be violated in the various possible modes of attempting to assert a fraudulent claim under § 61 or to recover alcohol used in the arts on which a rebate had been paid.

R. S. § 3256, prescribing a penalty of double the tax for evading payment of tax on distilled spirits.

R. S. § 3257, providing fine and imprisonment for a distiller defrauding the United States of tax.

R. S. § 3258, imprisonment for having in possession a still without registration.

R. S. § 3265, fine and forfeiture for setting up a still without permission.

R. S. § 3281, as amended by act of February 8, 1875, § 16, 1 Supp. R. S. 60, 18 Stat. L. 310, fine, imprisonment and forfeiture for carrying on business of rectifier or wholesale or retail liquor dealer without paying tax.

R. S. § 3296, fine and imprisonment for removal of distilled spirits to a place other than the distillery warehouse or in any manner other than provided by law.

R. S. § 3305, fine and imprisonment for making false entries or omitting entries in distillers' books.

R. S. § 3318, amended by act of March 1, 1879, § 5, 20 Stat. L. 339, 1 Supp. R. S. 233, fine and imprisonment for fraud by rectifiers.

R. S. § 3319, fine and forfeiture for a rectifier or liquor dealer to purchase distilled spirits in quantities greater than twenty gallons from unauthorized persons.

R. S. § 3324, fine and imprisonment for drawing off distilled spirits from the cask without effacing the mark, stamp and brand; forfeiture by transportation company for having in possession any empty cask having any brand, mark or stamp required by law on packages of distilled spirits; fine and imprisonment for removing stamp from a package of distilled spirits without defacing or destroying it, or for having stamp in possession or for having in possession any cancelled or used stamp.

R. S. § 3325, forfeiture for purchasing or selling any cask or package with inspection marks thereon.

R. S. § 3326, fine and imprisonment for altering stamp, brand or mark on any cask containing distilled spirits or putting in spirits of greater strength than indicated by inspection mark or fraudulently using marked cask for selling other spirits.

R. S. § 3455, fine and imprisonment for selling, giving away, purchasing or receiving package stamped, branded or marked so as to show that its contents have been inspected or tax paid thereon, if the package is empty or contains anything else than the contents which were therein stamped, or for making such marked package.

R. S. § 3456, fine and forfeiture for distiller, rectifier or wholesale liquor dealer neglecting to do the things required by law.

In addition to these, by R. S. § 3429, penalties are provided for altering or counterfeiting stamps or having in possession washed or altered stamps, and by §§ 5413 and 5414, fine and imprisonment for counterfeiting or alter-

ing any obligation of the United States, including stamps and other representatives of value.

R. S. §§ 3490-3494, penalty of \$2,000 and double the amount lost by the United States for presenting a fraudulent claim, and action by informer authorized.

R. S. § 5438, fine and imprisonment for presenting a fraudulent claim or false evidence in its support or conspiring to defraud the United States.

Attempts to commit fraud under § 61 could not have escaped one or more of these penalties.

### ***Difference Between Provisions Rejected and Provisions Adopted.***

We fully agree with the position taken on behalf of the United States (brief, p. 43) that the action of Congress in rejecting one provision for use of alcohol in the arts free from tax and adopting another shows that the problem was *how* to permit such use without detriment to the revenue.

The provisions of the bills introduced and discussed in 1882 and 1888 and again in 1894, the very day before the adoption of § 61, while intended to effect the same object as § 61, were framed upon a radically different theory. All provided for the use of alcohol in the arts by a system under which the alcohol is delivered free of tax. It is necessary to keep it under oversight until used or exported in the manner contemplated by the law.

Under such a system the revenue was perhaps more exposed to the dangers so graphically set forth in the brief of the Attorney-General, and hence a strict system of supervision was not unnaturally required by the amendment itself. Section 61 proceeds upon a totally different idea and therefore contains no provision for such a system.

The elaborate argument of the Attorney-General (pp.



55-62) that because supervision of manufacture is required in bonded warehouses it must necessarily have been contemplated under § 61, forgets that the bonded warehouse system was the very one rejected by the Senate the day before the adoption of § 61.

Precautions necessary where manufacturing free of tax in the first place was contemplated were not by any means imperative when the tax was first paid, and was then to be refunded on evidence satisfactory to the collector of internal revenue.

### **3. Legislative Construction by Inaction.**

The defense ingeniously elaborated in the brief of the Attorney-General in support of the position that § 61 of the act of 1894 was designedly made inoperative by Congress, involves a rule of statutory construction as extraordinary as has ever been submitted to a court of justice. It is that when an officer of the Government regards it as undesirable to carry a particular statute into execution without further legislation, he need only inform Congress of that fact, and await such further legislation. Then, if Congress do not act in accordance with his wishes, the act is inoperative. This statement might be regarded as satirical but for the fact that it is propounded in the brief (pp. 33, 34) in terms varying but little from those which we have used :

“When, therefore, a statute calls for action by an executive officer, and he reports that such action is impracticable until Congress has taken further steps, and that in the meantime the law must remain inoperative, and Congress does nothing further, the conclusion is irresistible that the understanding of Congress as to the operation of the law is and was all along the same as that of the Executive, and that it did not intend, even at the time that it enacted the law, that it should go into practical effect

unless the Executive took such action as its provisions called for."

What would happen if the Secretary refused to carry out the second law is not stated. Presumably Congress would be required to adopt a third enactment, before the will of that body, expressed in constitutional forms, could be carried into effect. It may well be asked, to what purpose are courts established if the enforcement of the laws against recalcitrant officials must be left to additional legislation.

It is admitted in the brief of the Attorney-General (p. 30) that no formal estimate in the manner required by law was made for the expense of carrying out § 61. With a frankness as remarkable as it is praiseworthy, it is also admitted (p. 30) that this failure

"was possibly due to the fact that he did not believe that Congress when once informed of the expenditure required would make any appropriation."

In other words, this law was not treated as any other law, to be carried out with the means available, and an estimate to be made in legal form for such additional expenses as were necessary.

Indeed, the assumption underlying all the arguments of the brief for the United States is that the present act is not to be treated as other acts of Congress, but is of a different character, requiring special rules of construction.

Inasmuch as the brief of the Attorney-General has (p. 25, note) challenged the summary given on page 70 of the brief for appellant of the communication of the Commissioner of Internal Revenue of January 9, 1895, it is deemed proper to print the whole of this communication in an appendix to this brief, as illustrative of the spirit in which this act was treated by the officers of the Treasury charged with its enforcement. This statement

does not constitute in the Treasury technical sense an estimate, and could not be so treated in Congress. It is argumentative in form, exaggerated in statement, and varies in its computations of the amount required from \$500,000 to \$10,000,000. Seldom, if ever, is any action by Congress based upon communications of such a character, especially when of a tone calculated to discourage, rather than to ask for, appropriations for the enforcement of existing laws.

### ***The Action of Congress on the Income Tax.***

The remarkable character of the rule of statutory construction required to support the position of the Government in this case is further illustrated by the arguments in the brief (pp. 28-34) based upon the action of Congress in regard to the income tax and the distribution of seeds.

In estimating for the expenses of the income tax (H. R. Ex. Doc. 13, 53d Congress, 3d session, p. 4) the Secretary was careful to follow the directions of the act of July 7, 1884, 1 Supp. R. S. 470, 23 Stat. L. 254, prescribing the method of transmitting estimates to Congress, but made no such estimate for the enforcement of § 61. No case can be found in which it was ever suggested that an appropriation for administering one law was "a very strong indication of the intention of Congress that" another "should not be carried into effect" (brief for United States, p. 29).

As for the enactment of further legislation to enforce the law for the distribution of seeds, there is nothing remarkable about the fact that Congress took determined action on a subject coming so closely home to the personal knowledge of every member. From the fact that peremptory action was taken by Congress confirming by amendment a long standing construction of a somewhat ambiguous

statute, no argument can be drawn as to the construction of some other statute which that body failed to amend.

#### **4. Alcohol on which Tax was Paid Before August 28, 1894.**

The act does not exclude alcohol on which the tax was paid before August 28, 1894. This was at 90 cents instead of \$1.10 a gallon. Its terms are unlimited in their description of the alcohol. A rebate is promised to the manufacturer who finds it "necessary to use alcohol" without qualification as to the date of payment of tax. The use "in the arts" is the consideration on which the promise is made. He is to satisfy the collector "that he has used such alcohol"; and, upon delivery of the stamps "to show that a tax has been paid thereon," he is to receive a "repayment of the tax so paid." The stamp showing payment of the tax is the measure of his right. The repayment is of the tax shown by the stamp to have been paid. Whatever tax was paid is to be refunded.

As there is no limitation expressed in the section from which an inference can be drawn that the rebate is limited to alcohol on which the tax had been paid after the passage of the act, equally so is there nothing implied in the section from which such an inference can be drawn. Neither does the brief for the Government (pp. 104-111) refer to a single other statute supporting such an inference.

The contention is that this limitation is necessarily implied in the act, although not expressed. This means that it is a necessary inference that Congress meant to do something else which the words do not express. If these words had been expressed, they would have been :

"But no rebate shall be paid if the tax was paid on the alcohol prior to the passage of this act."

It is a necessary corollary of the Government's position that these words would have been expressed if Congress had thought them necessary for a complete declaration of its purpose. But, if it can be shown that the expression of the words which the Government says are implied, would result on their face in so absurd consequences that Congress would have rejected the words had they been offered, then it must be admitted that they could not have been implied (*Holy Trinity Church v. United States*, 143 U. S. 457, 472). The briefest consideration shows the absurdity of their result and would have caused their rejection by Congress.

The consequences would have been these:

(1) If a manufacturer had on hand upon the passage of this act alcohol on which but ninety cents tax had been paid and used it, he would forfeit the rebate; while his trade competitors who had no stock of alcohol on hand would receive it. Can it be conceived that Congress meant to create such a condition?

(2) Instead of using this alcohol he could have carried it back to the dealer from whom he purchased it and have procured from him, after suitable delay, other alcohol on which the tax had been paid after August 28, 1894. Would it not have been absurd to require him to make this exchange?

(3) If he had no alcohol on hand and wished to use alcohol under this section, he would have been obliged to discriminate in his purchases and to buy alcohol on which the tax had been paid after August 28, 1894, leaving that on which the lower tax had been paid to be used in compounding beverages. Is not this an equally absurd consequence?

(4) If he had foreseen the possibility of this objection, and for abundant caution had used only alcohol on which the tax had been paid after August 28, 1894, the

Government would have been obliged to repay a tax of \$1.10 a gallon on all alcohol used instead of 90 cents on that earlier paid. This consequence must seem absurd from the standpoint of the Treasury.

(5) If he had used alcohol without distinction, instead of receiving his rebate out of the rate of tax paid, he now finds that he receives all the rebate claimed at the higher rate and nothing at the lower rate. This is an absurd result of making a moderate claim.

The sensible manufacturer, foreseeing these absurdities, without notice in the words of the statute of any distinction, used alcohol without regard to the date of payment of tax. Any construction would fall far short of the "perfection of reason" which would compel him to lose all rebate, because he used that on which the Government would repay him the lesser sum.

These being the consequences, the question is presented,—would Congress have passed in express terms such a provision? And the answer must be that no such foolish act would have been passed.

There is a sound reason for the claimant's construction, aside from the fact that the terms of the act plainly require it. The promise of the act is not to the distiller when he pays the tax, because he does not use the alcohol in the arts; nor is there an unconditional promise to the manufacturer when he buys it. The promise is that if the manufacturer uses alcohol in the arts, the tax shall be repaid. When the use occurs after the promise, the right accrues.

This is not a case where an absurd consequence results from the plain language of the law. The language here does not authorize this construction. It must be read into it by implication. The rule of statutory construction which the Government would need to support its contention would be something like the following:

"Absurd consequences may be implied in statutes, although not expressed."

## **5. Miscellaneous Considerations.**

### ***Policy of Free Alcohol in Congress.***

That portion of the brief for the United States (pp. 82-85), treating of the policy of free alcohol in the arts, has already been so fully treated in the brief for the appellant (pp 4-17), that we hardly need add any thing to what is there said.

A correction must, however, be made of the statement (p. 83) that the House of Representatives voted to increase the spirits tax from 90 cents to \$1.10 per proof gallon without making any exception in the case of alcohol used in the arts. The House voted to increase the tax from 90 cents to \$1. The Senate returned the bill with an amendment increasing that tax to \$1.10 and another allowing the use of alcohol free in the arts. Thus, the rate of \$1.10 was throughout coupled with the remission of tax on alcohol used in the arts.

### ***Construction Contended for by Claimant Requires No Change of Reading in Statute.***

It is suggested in the brief for the United States (p. 37) that the construction contended for by the claimant requires the insertion of a new term into the statute, to the effect that the manufacturer may use alcohol

"under regulations to be prescribed by the Secretary of the Treasury if he prescribe any, but, if he do not, then the manufacturer may use alcohol without being subject to any regulations whatever."

The view contended for by the claimant in this case involves no such reconstruction of the statute. What the statute directs, it means to have done. The purpose

of the law was that the Secretary of the Treasury should carry out its intention. It was not within the contemplation of Congress at the time of enacting this statute that the Secretary of the Treasury would refuse to comply with the legislative will. It was assumed as of course that he would obey it. To that extent, therefore, there was a condition of things not expected by Congress when passing the act. But it can not be said that the laws of the United States, taken as a whole, regard such a condition as impossible, or fail to provide for it.

The power of the Secretary of the Treasury to make regulations under the special provisions of § 61 of the act of 1894 is hardly broader than that conferred by Revised Statutes, § 251, that

"he shall prescribe \* \* \* rules and regulations not inconsistent with law to be used under and in the execution and enforcement of the various provisions of the internal revenue laws."

Under this provision the power of the Secretary of the Treasury to make regulations touching the subject of § 61 could not be doubted, even if that section made no reference to him. The special provision of § 61 merely confirmed the power already conferred by general law.

A possible failure by the head of any Department to carry out the provisions of law is contemplated and a remedy afforded to those whose individual interests are injuriously affected by his failure by the provisions of the acts conferring jurisdiction upon the Court of Claims of

"all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort,



in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable" (act of March 3, 1887, 1 Supp. R. S. 559, 24 Stat. L. 505).

Surely it can not be necessary in the enactment of any law requiring executive action to make special provision for the failure of executive officers to carry out their duties. Wherever the party for whose benefit a law was enacted brings himself within its provisions by doing the act upon the performance of which the right to receive money is vested, he brings his claim under a "law of Congress." A failure of the executive officer to take the steps for the ascertainment of the amount due, so far from depriving the Court of Claims of jurisdiction, furnishes the very occasion for its exercise.

Primarily, it was contemplated by this law that the manufacturer should be under regulations. It could not be presumed in advance that an executive officer would refuse to comply with a plain duty imposed upon him by mandatory provisions. That expectation having been disappointed, and every possible step having been taken by the party of the class named in the statute to bring himself within its provisions, he may safely rest upon the promise contained in the statute, and invoke through the courts the legal right thereby conferred, "to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

GEORGE A. KING,  
WILLIAM B. KING.

JOSEPH H. CHOATE,  
*Of Counsel.*

*Attorneys for Appellant.*

## APPENDIX.

LETTER OF COMMISSIONER OF INTERNAL REVENUE TO SECRETARY OF THE TREASURY, PUBLISHED IN SENATE EXECUTIVE DOCUMENT NO. 34, 53D CONGRESS, 3D SESSION, PP. 2, 3, AND IN ANNUAL REPORT OF THE SECRETARY OF THE TREASURY FOR 1894, PP. 991, 992.

TREASURY DEPARTMENT,  
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,  
WASHINGTON, D. C. *January 9, 1895.*

Hon. JOHN G. CARLISLE,  
*Secretary of the Treasury.*

SIR: In reply to your inquiry for an estimate of the expense of the administration of § 61 of the act of August 28, 1894, pursuant to the United States Senate's resolution of the 4th instant (which is herewith returned), I would say that nothing has come to my notice since November 28, 1894, the date of my last letter to you relative to this matter, which leads me to believe that the expense of official supervision was at that time over-estimated.

It was stated in that letter that the expense of the necessary official supervision would not be less than \$500,000 per annum. This estimate was based upon the number of officers required whose duties would be similar to those required of storekeepers and gaugers. There are about 1,600 distilleries in the United States requiring the services of some 1,200 storekeepers and gaugers, and 650 storekeepers who were paid last year \$1,200,000, at a rate of compensation ranging from \$2 to \$4 per day.

It was estimated that if the number of manufacturers could be reduced by regulation to 1,600, a number equal to the number of distilleries, and if these officers could serve as to these manufacturers more economically than they serve as to the distilleries, the expense for this service would not be less than \$500,000 per annum.

Since November 28, 1894, I have obtained further information in regard to the use of alcohol by druggists and by manufacturers of patent medicines, and feel warranted in

estimating the number of druggists who are now in the habit of buying alcohol in distillers' original packages, or other packages containing each 40 gallons or more, at 3,800, and the number of patent-medicine manufacturers at 200. It is not seen from these figures how the number of the favored class as to those who use alcohol in any medicinal or other like compound could well be less than 4,000. In fact it is not clearly seen how any discrimination could be made against any druggist who makes medicinal or other like compounds in which (as happens in the business of all or nearly all druggists) alcohol is a necessary component part. It is true that druggists whose business does not warrant the purchase of the ordinary distillers' original 40-gallon package of alcohol, have heretofore usually purchased their supplies in small packages put up from distillers' packages by rectifiers and liquor dealers.

As, however, distillers' original packages may, under the internal-revenue laws, contain as small a quantity as 10 wine gallons, it would seem that most druggists who have heretofore obtained the alcohol to be used in the manufacture of tinctures and extracts from liquor dealers will buy directly from the distillers or from those who deal in distillers' original packages, containing 10 wine gallons each. How can it be said that a manufacturer is not a manufacturer because the amount of business done by him is small? There being no special statutory definition in this instance, no such discrimination could be made by the Treasury Department.

This being the case it would seem that the number of manufacturers who daily, Sundays not excepted, use alcohol in medicinal or other like compounds would be more nearly 32,000 than 1,600, involving an outlay of \$10,000,000 rather than \$500,000.

Nevertheless, although these small druggists are required to make up these medicinal compounds at all hours of the day and night and Sundays, their great number affords an opportunity for economical official supervision not otherwise possible. Even with this advantage, however, when the fact is also taken into account that the operations of photographers, manufacturing

chemists, perfumers, manufacturers of flavoring extracts, hatters, paint and varnish manufacturers, manufacturers of tobacco and cigars, of woolen goods, of carpets, of mince meat, and of glue, would necessarily also be brought under the same surveillance when the use of alcohol in such arts and manufactures is claimed, it would seem to be improper to estimate the expense of an efficient administration at less than \$1,000,000 annually.

Respectfully yours,

JOS. S. MILLER,  
*Commissioner.*

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IN THE

**Supreme Court of the United States.**

OCTOBER TERM, 1898.

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ROBERT DUNLAP, *Appellant*,

v.

THE UNITED STATES.

} No. 218.

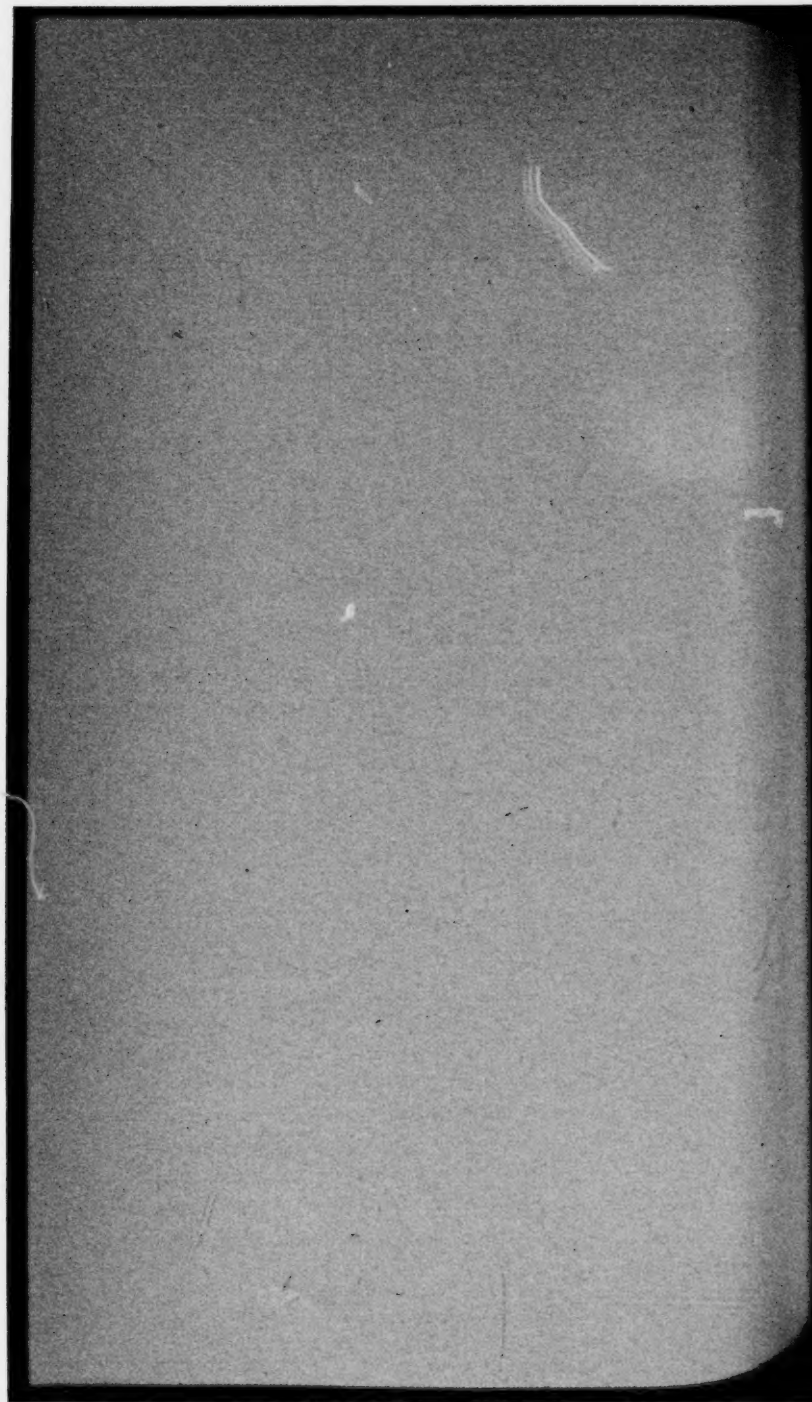
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**Petition for Rehearing.**

---

BENJA. F. TRACY,  
GEORGE A. KING,  
WILLIAM B. KING,  
JOHN B. COTTON,

Attorneys for Appellant.



IN THE  
**Supreme Court of the United States.**

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---

**PETITION FOR REHEARING.**

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Now comes the appellant, Robert Dunlap, and prays the court to set aside the judgment entered in this case on the 20th day of February, 1899, affirming the judgment of the Court of Claims, and to grant a rehearing. This petition is based on the following reasons:

**Grounds of Decision.**

The Court of Claims decided this case on the ground that the prescription of regulations by the Secretary of the Treasury was a condition to the grant of rebate. It expressly refrained from deciding whether the Secretary was directed to prescribe regulations. This court, sustaining the ground adopted by the court below, adds the further ground, that it was discretionary in the Secretary of the Treasury whether he should prescribe regulations. It is the purpose of this argument to analyze in detail the reasons assigned by this court for both these positions and to endeavor to show not only that they are untenable but also that important arguments bearing on appellant's case have been overlooked.



# **I. WAS THE ISSUANCE OF REGULATIONS DISCRETIONARY WITH THE SECRETARY?**

## **The Right of Taxation Legislative, Not Executive.**

In the appellant's opening brief (pp. 56-63) it is pointed out that the right to lay taxes, vested in Congress, can not be delegated to executive authority,—“a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution ” (143 U. S. 692).

Section 61 of the revenue act of 1894 was a law relieving alcohol from taxation, under conditions named. Its object, the Court of Claims says, was that alcohol used in the arts should be “relieved of the burden of taxation.” This court, in *Campbell v. United States* (107 U. S. 413) said :

“The drawback provision was simply a mode of making the linseed so imported and exported without distribution in the country duty free.”

The Secretary of the Treasury (Sen. Ex. Doc. 34, 53d Congress, 3d session) spoke of this section as :

“The provision of the act of 1894 exempting from taxation alcohol used in the arts and for medicinal purposes.”

Thus it was uniformly recognized that this rebate law was intended to relieve from taxation, as much as if it had provided that the tax should not be originally paid. It is therefore governed by the same principles as would control such a law.

The opinion of the court in *Field v. Clark*, 143 U. S. 692, sustained the constitutionality of the reciprocity

provision of the revenue act of 1890 on the sole ground that

"nothing involving the expediency or just operation of such legislation was left to the determination of the President. \* \* It does not, in any real sense, invest the President with the power of legislation."

The distinguished author of the concurring opinion in that case used the following language (p. 700) in regard to this provision:

"It unquestionably vests in the President the power to regulate our commerce with all foreign nations which produce sugar, tea, coffee, molasses, hides or any of such articles; and to impose revenue duties upon them for a length of time limited solely by his discretion, whenever he deems the revenue system or policy of any nation in which those articles are produced, reciprocally unequal and unreasonable, in its operation upon the products of this country.

"These features of this section are, in our opinion, in palpable violation of the Constitution of the United States, and serve to distinguish it from the legislative precedents which are relied upon to sustain it, as the practice of the government. None of these legislative precedents, save the one above referred to, have, as yet, undergone review by this court or been sustained by its decision. And if there be any Congressional legislation which may be construed as delegating to the President the power to suspend any law exempting any importations from duty, or to reimpose revenue duties on them, upon his own judgment as to what constitutes in the revenue policy of other countries a fair and reasonable reciprocity, such legislative precedents can not avail as authority against a clear and undoubted principle of the Constitution."

This seems difficult to reconcile with the views announced in the opinion in this case:

"Congress may reasonably be held to have left it to the Secretary to determine whether or not such regula-

tions could be framed, and if so, whether further legislation would be required. It is true that the right to the rebate was derived from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations if he found it practicable to do so."

"We think the argument entitled to great weight, and that it demonstrates the intention of Congress to leave the entire matter to the Treasury Department to ascertain what would be needed in order to carry the section into effect."

No consideration whatever is given in the opinion to the important point now urged that to hold it discretionary in the Secretary to enforce a tax law is to declare that Congress vested in him legislative powers, contrary to the limitations of the Constitution.

The mandatory words of the act, "regulations to be prescribed," are not referred to at all in the opinion, although it insists on a literal construction in the words :

"Nor are we able to see that the letter of the statute did not fully disclose the intent."

On the contrary, the court thus states its position in this regard :

"It was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations *if he found it practicable to do so.*"

It is thus necessary to this position to introduce into the act a condition nowhere in it expressed and inconsistent with the words used. This is submitted as the most convincing argument to show the error of this position of the court.

### Assertions in Debate.

The opinion upholds this position by arguments which should be subjected to further discussion before receiving the final sanction of this court. An assertion on the floor of the Senate by a Senator not the author of § 61 to the effect that discretion was given in this section to the Secretary of the Treasury is inserted in the opinion of the court with the remark that it is "interesting to note." It is hard to find a valid reason for noting it there, unless it is to be considered of value in determining the intent of the act. This purpose is disclaimed in the opening clause of the paragraph in which the quotation appears, and reference is made to a very recent case which in no uncertain terms declares such an argument inadmissible (*United States v. Freight Association*, 166 U. S. 316):

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

It is therefore clear that it is not intended that this quotation should have any weight whatever in supporting the reasoning of the opinion. Were no other grounds advanced for the conclusion, this would necessarily be declared erroneous. Yet it would be very unfortunate if a doctrine so clearly declared in the case cited should be subjected to doubt by the use in this case of a quotation which future astute advocates will declare could have no other office in a judicial opinion than as an exposition of the intent of Congress.

### **The Subsequent Action of the Secretary and of Congress.**

An argument in support of the position that the Secretary was given discretion whether to enforce this law is also apparently drawn from the following facts:

The Secretary declined to execute it, asserting a want of sufficient funds; he so notified the Congress which passed it, at its next session, and at the following session the next Congress repealed the law. The counsel for both parties have been unable to find any precedents bearing upon either side of this argument. It may fairly be said that the reason for this is that it is now for the first time intimated that such facts constitute a rule of statutory interpretation.

The position of the court gains no strength from the action of the Secretary, as he neither expressed his inability to make regulations nor asserted any discretion in himself. His position was that he had no funds, such as would be required to execute efficient regulations. The analysis of the question of appropriation made in the appellant's brief showed so conclusively that the Secretary was wrong in the reason asserted by him that neither this court nor the court below justified his action on that ground. He refused to execute the law for one reason—that he had no funds. The Court of Claims disclaimed inquiry into his reasons or duty. This court sustains his action for another reason, never asserted by him,—that it was within his discretion to execute the law, if he approved it as practicable.

Was the inaction of Congress upon his report at its next session a construction of the original act? How can it be said that the failure of Congress to make a further appropriation to administer this law was due to approval of the Secretary's failure to carry it out, rather than to a belief that he had sufficient funds already

available for the purpose, or simply to the fact that he made no proper estimate for the appropriation which he thought necessary? Where is the inaction of Congress declared to be an expression of a positive purpose? The purpose of Congress is expressed by its resolves, and here none was made. The House of Representatives passed a bill repealing § 61, but the Senate failed to concur (26 Cong. Rec. 8594, 8604, 8614). What this does show is that it was not the desire of this Congress that the law should be repealed.

It can not be seen what effect the repeal of the law by the next Congress had upon rights granted under the original law or how it could be considered a construction of it. The membership of Congress was different. It is a matter of public history that its House of Representatives would have framed a revenue measure upon entirely different lines from the act of August 28, 1894. Therefore the repeal of the law is no more a factor bearing upon its construction than is the substitution by the next succeeding Congress in 1897 of a new revenue act in place of that of 1894 to be considered in construing the terms of the act of 1894.

Thus it must be concluded that, however interesting as matters of history may be, the report of the Secretary of the Treasury, or the failure of one Congress to make appropriation or the repeal of § 61 by the next Congress, neither one alone nor all together establish the position for which they seem to be cited, that Congress in passing the original act desired to vest discretion in the Secretary of the Treasury, whether alcohol used in the arts should be free of tax.

The doctrine announced by the court seems inconsistent with a recognized constitutional principle and it is thought the reasons given in the opinion can not be sustained on analysis. Hence the decision already made should be set aside and a rehearing ordered.

## II. ARE REGULATIONS A CONDITION TO REBATE ?

### **The Expectation of Congress.**

It is assumed in the opinion that this law can be executed in no other way than under executive regulations because other laws taxing alcohol are administered under executive regulation and supervision. The opinion says:

“It seems clear that when Congress undertook to provide for refunding the tax on alcohol when used in the arts, it manifestly regarded adequate regulations to prevent loss through fraudulent claims as absolutely an essential prerequisite.”

“Nothing could have been further from the mind of Congress than that repayment must be made on the unregulated use of alcohol in the arts, if in the judgment of the department, as the matter stood, such use could not be regulated.”

It is a sufficient answer to this that the making of regulations was required of the Secretary of the Treasury and that Congress in passing § 61 expected that he would obey it. The expectation of Congress was that regulations would be made and, to apply the words of the opinion, “nothing could have been further from the mind of Congress than” that the Department would refuse to issue regulations. We are now confronting a condition not expected by Congress to arise. The fact urged by the government that the manufacture of alcohol and its sale are hedged about by most elaborate restrictions, when coupled with the requirement of this act that regulations should be made by the Secretary of the Treasury, is clearly convincing of the position that Congress expected that regulations would be made, but it does not help at all in answering the inquiry: What are the rights of citizens interested, when the executive refused to perform the duties prescribed by the law? The

answer to this inquiry is found in the general principle that a party may not profit by the failure of performance of his own obligation and, if objected that this principle is inapplicable to the government, then more directly still by the principle that the right to tax or to make free of tax is exclusively legislative and that the executive may not be given discretion in this particular.

It seems an inappropriate doctrine to be propounded by the judiciary that the government is in danger of being defrauded by permitting the establishment of a right under this statute, in the absence of executive regulations, by proof of all the conditions of that right by judicial evidence and trial. The courts to which is committed the determination of questions between citizens and the government arising from the failure of government officers to do acts required of them by statutes or lawful contracts are accustomed to require a degree of proof sufficient to protect the interest of the government. That these rules would be relaxed in this class of cases is not to be supposed. In other words, the Secretary of the Treasury having failed to prescribe regulations, the judiciary is to substitute for those regulations convincing evidence produced under judicial safeguards, of the facts constituting the claimant's right.

The executive having failed to do what was expected of it by Congress, that is, to prescribe regulations, we now submit the question whether it was more within the expectation of Congress that the freedom from tax intended by the statute should fail or that, when denied by the executive, it should be protected by the judiciary. It is not within the expectation of Congress that any citizen to whom a right is granted should be deprived that right by the executive department charged with enforcing it, yet that frequently happens and the right of redress by the judiciary is not denied.



### The Authorities Contrasted.

*United States v. McLean* and *Campbell v. United States*.

The only authority cited by the court in support of the position that regulations are a prerequisite to rebate is *United States v. McLean* (95 U. S. 750). It is held that this presents a closer analogy to the present case than *Campbell v. United States* (107 U. S. 407). In the former case executive action was held essential to the completion of a right granted and in the other executive action was only an incident in the ascertainment of the right. To show the difference between the present case and that of *Campbell v. United States*, the two controlling statutes are given in parallel columns. Bringing into the comparison the statutes controlling *United States v. McLean*, a far greater divergence appears:

*Act of July 1, 1864, § 2,*  
13 Stat. L. 336.

"That the Postmaster-General shall review once in two years, and in special cases, upon satisfactory representation, as much oftener as he may deem expedient, and readjust, on the basis of the preceding section, the salary assigned by him to any office;"

*Act of June 12, 1866, § 8,*  
14 Stat. L. 60, amends this by adding:

"Provided, That when the quarterly returns of any postmaster of the third, fourth or fifth class show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of 1854, fixing compensation, then the Postmaster-General shall review and readjust under the provisions of said section."

*Act of August 28, 1894, § 61,*  
28 Stat. L. 567.

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

*Act of August 5, 1861, § 4,*  
12 Stat. L. 292.

"From and after the passage of this act, there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback, equal in amount to the duty paid on such materials and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury; Provided, that ten per centum on the amount of all drawbacks, so allowed, shall be retained for the use of the United States by the collectors paying such drawbacks respectively."

It can not be denied that the phraseology of the statute—and this argument of the court rests on phraseology alone—would place the act of 1894 in the class with that of 1861, rather than those of 1864 and 1866.

While the opinion points out the distinction between the acts of 1861 and 1894, the whole course of reasoning is overlooked by which the conclusion in the *Campbell* case was reached. This was not by a verbal criticism of the statute but by consideration of its purpose and object.

“He [the collector of customs] exercises no judicial or *quasi*-judicial function. He concludes nobody’s rights and has no power to do so. The rights which the law gives can not be defeated by his refusal to act, nor by his decision that no drawback was due.

“Neither the act of Congress, nor any rule of construction known to us, makes the claimant’s right, when the facts on which it depends are clearly established, to turn upon the view which the collector or the Secretary, or both combined, may entertain of the law upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them.” (107 U. S. 413.)

The primary object of the statute was to make free of duty what had been taxed by another law. The object was to be accomplished, with due regard to the protection of the revenue, by the ascertainment of the facts and the repayment of the tax under executive regulation. This court did not permit the object of the law to fail because the sole mode of executing it declared in the statute was not accomplished. It substituted a judicial, for the statutory executive, method.

There is no difference here. However carefully may be pointed out the discriminations in phraseology between the acts of 1861 and 1894, it has never been shown that any different object is to be attained under the one act than under the other—the ascertainment, under due

safeguards, of the amount of tax to be rebated to each person entitled to it. The conditions are all given in the act,—the use by a manufacturer, the use in the arts or medicines, and the necessity for the use. When these are met, the intention was to give the rebate. The rest is the ascertainment of the right.

When tried by a practical standard, there is no difference between the mode of ascertaining the amount of drawback under the act of 1861 and of rebate under the act of 1894. Under the earlier law and its subsequent re-enactments and amendments, the Treasury Department has always insisted upon a right to supervise the process of manufacture.

Thus in Treasury circular 84 of June 8, 1897 (Synopsis 18,097), amending Article 758 of the Customs Regulations of 1892, that the proprietor of the factory at which goods covered by drawback entry are manufactured, shall declare

“that a separate true account of all imported materials, and of all articles manufactured therefrom for export, is kept at such place or factory and that such account is at all times open to the inspection of officers of the customs.”

It was thus also specially provided, on December 7, 1898, in making regulations for the repayment of “Drawback on pig iron, steel billets, steel rails, or steel fish plates” (Treasury Decisions, Vol. 2, p. 987, Synopsis 20,400) under section 30 of the act of July 24, 1897 (30 Stat. L. 211), the latest re-enactment of the section considered in the *Campbell* case,

“On receipt of the aforesaid statement, the collector will detail a customs officer to supervise and inspect the process of manufacture for export with benefit of drawback, and the manufacturers shall be required to reimburse the government for the compensation paid to such officer during the time he is so employed, and such officer

shall at all times be given free access to the works of said company, and to the records pertaining to the manufacture of the articles to be exported."

Here is a regulated manufacture as complete as has been contended for under § 61 of the act of 1894.

*Morrill v. Jones.*

Notwithstanding this verbal comparison between the acts of 1861 and 1894, and the discrimination declared to exist between the object of regulations under the two acts, we find no reference to the practically identical statute construed in *Morrill v. Jones* (106 U. S. 466). Here again parallel columns are used to indicate the relation :

*Revised Statutes, § 2505.*

"Animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free, upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe."

*Act of August 28, 1894, § 61,  
28 Stat. L. 567.*

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

Under this law there was to be no ascertainment of any amount by the Secretary of the Treasury, but there was to be a regulated importation, doubtless involving personal inspection. Animals were admitted without this regulated importation, and yet the claimant's right to freedom from tax was granted by this court.

We submit that the fundamental error in allying this

case with that of *McLean* rather than with those of *Campbell* and *Jones* is in overlooking the constitutional principle already here alluded to, that the right to lay or remove taxes rests in Congress alone.

### **Prior Revenue Decisions.**

It is a striking fact that until the decision of this case, in all of the many cases before this and other Federal courts, involving the effect of executive regulations upon the rights of citizens under revenue laws the object of the statute in taxing or not taxing had been enforced in spite of executive action or inaction. Of such cases we name the following, some, but not all, of which were treated in the appellant's briefs:

- Dollar Savings Bank v. United States*, 19 Wall. 227 ;
- United States v. 200 Barrels of Whiskey*, 95 U. S. 571, 576 ;
- Merritt v. Welsh*, 104 U. S. 694 ;
- Morrill v. Jones*, 106 U. S. 466 ;
- Campbell v. United States*, 107 U. S. 407 ;
- Wright v. Roseberry*, 121 U. S. 488, 509 ;
- United States v. Ballin*, 144 U. S. 1 ;
- United States v. Eaton*, 144 U. S. 677, 687 ;
- United States v. American Tobacco Co.* 166 U. S. 468 ;
- Balfour v. Sullivan*, 19 Fed. Rep. 578 ;
- Pascal v. Sullivan*, 21 Fed. Rep. 496 ;
- Siegfried v. Phelps*, 40 Fed. Rep. 660 ;
- Dominici v. United States*, 72 Fed. Rep. 46 ;
- United States v. Mercadante*, 72 Fed. Rep. 46 ;
- Bartram v. United States*, 77 Fed. Rep. 604 ;
- United States v. Dominici*, 78 Fed. Rep. 334.

The following under the public land and other laws are added :

- Railroad Co. v. Smith*, 9 Wall. 95 ;

*French v. Fyan*, 93 U. S. 169 ;

*United States v. Mann*, 2 Brock. 1 ;

*United States v. Bedgood*, 49 Fed. Rep. 54 ;

*Anchor v. Howe*, 50 Fed. Rep. 367.

The only case in opposition to this position cited by the Attorney-General or considered by the court, is *United States v. McLean*, 95 U. S. 750. This case involved the salary of a postmaster, where a readjustment upon evidence presented to the head of the Department was made necessary by the express terms of the law ;—not the case of a regulation to carry out an object already expressed in statute. The decision was reached with regret, if not hesitation ; it was based on the peculiarities of the statute in the case and on no prior cases ; its authority is seriously shaken by the later decision on the same subject of litigation (*McLean v. Vilas*, 124 U. S. 86), and it has never been cited by this court as a precedent except in cases relating to the very subject involved.

### CONCLUSION.

The present case involves questions of far-reaching importance touching the relations of the executive with the legislative power. The very close division of the court attests their difficulty more strongly than could any argument of counsel. These reasons make it peculiarly desirable that a conclusion of a more decisive character than that reached by a nearly equally divided court should be attained. It is thought that this may be reached by a reargument and reconsideration of the case.

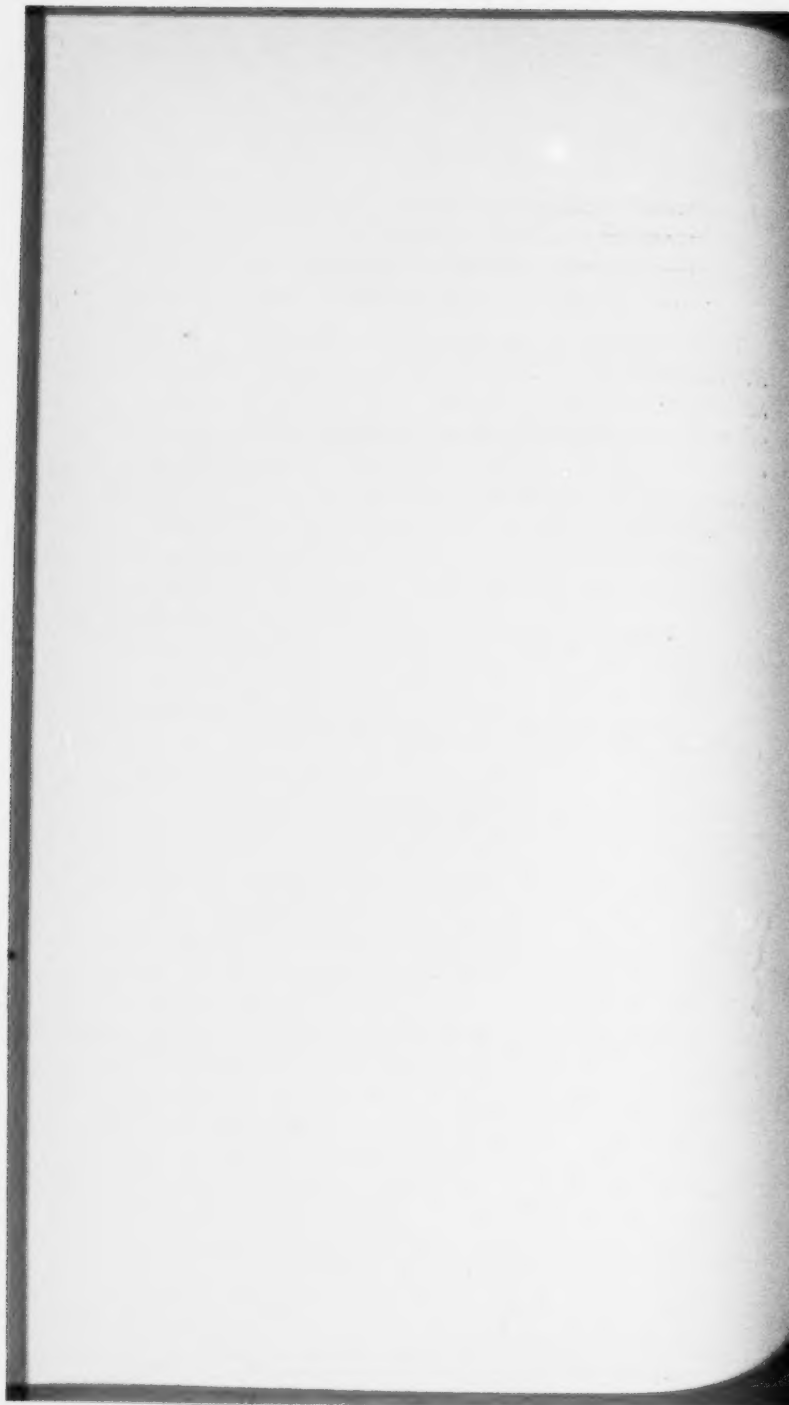
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JOHN B. COTTON,

*Counsel for Appellant.*



No. 218  
J. W. Gumpes  
Feb 21 1882

*Sealed*

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In the Supreme Court of the United States

ROBERT PRITCHARD, Plaintiff,

THE UNITED STATES, Defendant.

APPEAL FROM THE COURT OF CLAIMS

BRING FOR THE UNITED STATES

CHARLES C. BURNEY,  
Special Attorney

JOHN W. GUMPES,  
Attorney General

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# In the Supreme Court of the United States.

OCTOBER TERM, 1898.

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ROBERT DUNLAP, APPELLANT, }  
                                  *v.* } No. 218.  
THE UNITED STATES. }

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## APPEAL FROM THE COURT OF CLAIMS.

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### BRIEF FOR THE UNITED STATES.

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#### STATEMENT OF THE CASE.

The appellant is a hat manufacturer in Brooklyn, N. Y. Between August 28, 1894, and April 24, 1895, he used 7,060.95 proof gallons of domestic alcohol to dissolve the shellac required to stiffen the hats made at his factory. An internal-revenue tax of 90 cents per proof gallon had been paid upon 2,604.17 proof gallons of this alcohol before August 28, 1894, making \$2,344.40, and a tax of \$1.10 per proof gallon had been paid upon the remaining 4,456.78 proof gallons after August 28,

1894, making \$4,900.81, or \$7,245.21 in all. On October 17, 1894, the appellant notified the collector of internal revenue for the first district of New York that he was using domestic alcohol at his factory, and that, under section 61 of the act of August 28, 1894 (28 Stats., 509, 567), he claimed a rebate of the internal-revenue tax paid on the said alcohol, and he requested the said collector to take such official action relative to inspection and surveillance as the law and regulations might require. Subsequently the appellant tendered to the said collector affidavits and other evidence tending to show that he had used the aforesaid quantity of alcohol in his business, together with the stamps showing payment of the tax on the said alcohol, and he requested the said collector to visit the factory and satisfy himself, by an examination of the books or in any other manner, that the alcohol had been used as alleged. The appellant also requested payment of the amount of tax appearing from the stamps to have been paid. The Commissioner of Internal Revenue having announced, on November 24, 1894, under instructions from the Secretary of the Treasury, that no such application for rebate could be entertained, the collector declined to receive the stamps, affidavits, or other evidence.

The Secretary's instructions were issued on the express ground that no regulations under section 61 of the act of August 28, 1894, could adequately protect the Government and honest manufacturers without official supervision, for which Congress had made no appropriation. On the reassembling of Congress in December,

1894, the Secretary brought the matter to its attention in his finance report, and submitted a draft of such regulations as the Commissioner thought necessary, with an estimate of the amount required for their enforcement, which amount he put at not less than \$500,000 per annum. Congress made no appropriation for the purpose, and on June 3, 1896, repealed the section.

In consequence of the collector's refusal to entertain the appellant's application, the latter filed a petition in the Court of Claims for the full amount of the tax which had been paid upon the alcohol used by him as above stated, as shown by the stamps. On December 6, 1897, the court gave judgment that his petition be dismissed, whereupon he took this appeal.

#### BRIEF OF ARGUMENT.

This case involves the construction of section 61 of the *Act of August 28, 1894* (28 Stats., 509, 567), reading as follows:

SEC. 61. Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid.

## THE QUESTION TO BE DECIDED.

The question to be settled is whether the rebate provided for by this section is to be paid upon alcohol used "in the arts or in any medicinal or other like compound," without regard to the conditions under which it is used, or only upon alcohol so used "under regulations to be prescribed by the Secretary of the Treasury." The court below has held that the latter is the use contemplated by the statute, that "the regulations 'to be prescribed by the Secretary of the Treasury' form a part of the affirmative right of the claimant to the rebate," and that "the grant embodies as one of its essential elements such regulations," so that "the want of such regulations can not be supplied by the failure of the Secretary to prescribe regulations." Certainly this view accords with the literal meaning of the words of the statute. The mere use of alcohol "in the arts or in any medicinal or other like compound" had been carried on from time immemorial, and no rebate of the tax had ever, from the inception of our present internal-revenue system, been granted for such use. This section, however, permitted manufacturers to do something which previously they could not do, viz, to use alcohol in the arts or in any medicinal or other like compound, under regulations "prescribed by the Secretary of the Treasury," and on proof of such use, and of the payment of the tax on the alcohol so used, a rebate of that tax was to be made. Clearly the words, taken literally, indicate that the rebate is not to be paid upon the unregulated use of alcohol, but upon its use "under regulations," a use which could only exist under this



section; and it is submitted that this literal meaning of the words is precisely that which Congress intended should be given to them.

Appellant's counsel (Brief, p. 106) contend that "the single question before the court is whether freedom from tax granted by Congress can be defeated by executive inaction," but it is submitted that the real question is very different from this, being, on the contrary, whether a right which Congress has promised shall exist in consequence of the doing of certain things under executive regulation, the necessity of such regulation being manifest, can exist upon the mere doing of these things without executive regulation, Congress having failed to take steps to enable the executive to act in the matter.

REGULATIONS WERE TO BE PRESCRIBED BEFORE ANY  
RIGHT TO REBATE COULD EXIST.

Taking section 61 literally, as the court below has done, it is clear, in the first place, that it was not intended to take effect immediately, in the sense of applying to all alcohol used in the arts, etc., from the moment that the act containing this section became a law. The use of alcohol to which the section applied was a use under regulations *to be* prescribed. The regulations were not already prescribed, but were referred to as regulations *to be* prescribed—to exist, that is to say, at some future time. Until the regulations existed and were prescribed there could be no use of alcohol under them, and hence no right to rebate. Clearly this would have been the case, even if the regulations had ultimately been prescribed.

It is equally clear, in the second place, that an appreciable time would have had to elapse, even under the most

favorable circumstances, before the regulations could have been prescribed. Had the Secretary of the Treasury been provided, even from the first, with ample funds to employ all the officers needed to enforce his regulations, it is certain that such regulations could not at once have been drafted, nor the necessary officers selected and appointed. In view of the number of establishments to be regulated and the extent of territory to be covered, two or three months, at least, would have elapsed before the Bureau of Internal Revenue would have been in a position to carry out the law all over the country, and justice would have required that it should go into operation everywhere simultaneously, as otherwise some manufacturers would for a time have an advantage over some of their competitors. While it might have been possible for manufacturers to conform to the spirit of the regulations to some extent, even before they were prescribed or enforced, it is evident that the regulations as to supervision, which the Secretary not merely could, but (to judge by the regulations drafted) certainly would have required, could not have been complied with until the necessary officers had been assigned to duty. It can not be contended for a moment that under those circumstances the Secretary would not have been allowed a reasonable time before he could be called upon to prescribe the regulations, or that the right to rebate would have existed as to alcohol used before the Treasury Department was in a position to carry out the law.

If, however, it be clear that the law did not give the users of alcohol in the arts, etc., an immediate right to rebate, but only provided for a right to exist in the

future, in consequence of circumstances which could not themselves exist until after an appreciable time had elapsed, it must be equally clear that this was because the existence of the regulations was essential to the existence of the right to rebate, or, in other words, that until the regulations had been prescribed, and the alcohol had been used under them, no right to rebate arose. Hence if, as was actually the case, the regulations never were prescribed, and no alcohol ever was used under them, there never was any right to rebate at all. To concede that the existence of the right to rebate could be delayed, on account of the need of executive action, one day or one hour after the act of August 28, 1894, became a law, is to concede the whole case of the United States. Either section 61 gave to manufacturers using alcohol in the arts, etc., a right to rebate before regulations could have existed, to say nothing of the possibility of enforcing them, or else it gave no such right until they had been prescribed. Either the law gave the right from the first moment that it became a law, without regard to the existence of regulations, or else it made the existence of the right to a rebate to depend upon the prior existence of regulations and upon the use of alcohol thereunder. The first alternative being clearly untenable, the second must stand.

A RIGHT CAN PROPERLY BE CONDITIONED ON PRIOR  
PERFORMANCE OF AN EXECUTIVE ACT.

There is nothing new or extraordinary in a statute which provides that a right shall come into existence after an executive act is performed, and not before. This

court has more than once ruled upon such a provision. The act of June 12, 1866, section 8 (14 Stats., 60), provided "that when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is 10 per centum less than it would be on the basis of commissions under the act of 1854 fixing compensation, then the Postmaster-General shall review and readjust under the provisions of said section," and in *United States v. McLean* (95 U. S., 750), it was held that there could be no increase of salary, though warranted by the quarterly returns of an office, until readjustment by the Postmaster-General. Strong, J., said:

The law imposes no obligation upon the Government to pay an increased salary unless a readjustment has preceded it; and by the act of 1866 the Postmaster-General is not to readjust an existing salary unless the quarterly returns made show cause for it. Now, if it be conceded that the quarterly returns made on the last day of each quarter, beginning with June 30, 1871, made it the duty of the Postmaster-General to make a readjustment immediately on the receipt of the returns, still his readjustment was an executive act, made necessary by the law, in order to perfect any liability of the Government. If the executive officer failed to do his duty, he might have been constrained by a *mandamus*. But courts can not perform executive duties, nor treat them as performed when they have been neglected. They can not enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled. The judgment was therefore erroneous, and must be reversed.

The same doctrine was applied in *United States v. Verdier* (164 U. S., 213), where it was held that under the act of March 3, 1883 (22 Stats., 487), "until the readjustment was made, the law imposed no obligation upon the Government to pay [a postmaster] an increased salary," although the statute directed such readjustment to be made. It is true that in *McLean v. Vilas* (124 U. S., 86) it was held that the statute under consideration in *United States v. McLean* did not require the Postmaster-General to make a readjustment oftener than once in two years, though in cases of hardship he had discretionary power to do so, but this decision in no way weakens the doctrine of *United States v. McLean*, to the effect that until the executive act of readjustment was performed the statute gave no right to an increased salary.

It is submitted that *United States v. McLean* and *United States v. Verdier* furnish an exact precedent for the judgment of the court below in the present case and that the judgment can not be reversed without overruling those decisions. The appellant asks this court to treat the use of alcohol in his manufactures as if that use had occurred under the regulations of the Secretary of the Treasury, or, in other words, to treat as performed an executive act which, he admits, has not been performed, and to enforce a right dependent for its existence upon a prior performance by an executive officer of certain duties he has (justifiably or not) failed to perform. In point of fact the present case calls for the application of the doctrine of *United States v. McLean* and *United States v. Verdier* more forcibly than did those cases themselves. The acts to be performed in those

cases were of such a ministerial character that a mandamus could have been issued to compel performance, whereas in the present case the executive act involved such an exercise of discretion that the appellant insists, and apparently with reason, that no mandamus could have been had. If a court can not treat as performed a purely ministerial act required by statute, *a fortiori* it can not dispense with performance of an act involving a wide range of discretion.

REASONS FOR A LITERAL CONSTRUCTION OF SECTION  
61—LITERAL INTERPRETATION THE RULE WITH  
UNAMBIGUOUS STATUTES.

Any attempt to avoid the conclusion that the rebate was granted for a use under regulations only must necessarily involve giving to section 61 some other construction than that warranted by the literal natural meaning of its words, but it is submitted that the section does not admit of any other than a literal construction. The rule of literal interpretation is a primary rule in the construction of statutes and must be adhered to wherever the words of the statute are not ambiguous or uncertain. Thus in *Edrich's Case* (5 Coke, 118a) the act of 32 Henry VIII, Cap. 37, had provided that the person to whom a rent was due *pur autre vie* could distrain for it after the death of the *cestuy que vie*, and it was contended that this was a hardship on the remainderman and inconsistent with another part of the same act, but—

the judges said they ought not to make any construction against the express letter of the statute; for nothing can so express the meaning of the makers of the act as their own direct words, for *inder animi*

*sermo.* And it would be dangerous to give scope to make a construction in any case against the express words when the meaning of the makers doth not appear to the contrary, and when no inconvenience \* will thereupon follow; and therefore in such cases *a verbis legis non est recedendum.*

In *Sturges v. Crowninshield* (4 Wheat., 122, 202) it was contended that the constitutional prohibition of State laws impairing the obligation of contracts could not have been intended to apply to such insolvent laws as had been passed by the colonial and State legislatures from the earliest times, although such laws produced the forbidden result. MARSHALL, C. J., however, said:

Although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision not contradicted by any other provision in the same instrument is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be

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\*The word "inconvenience," which, in the time of James I was equivalent to "impropriety," is no less quaint than forcible, for certainly nothing could be more inconvenient, in the modern sense, to an owner of land than to be distrained upon for a rent due by his predecessor.

one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application. This is certainly not such a case.

Further citation of authority in support of this familiar doctrine would be clearly superfluous, especially as this court has but recently declared itself upon the point in the following words:

It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. (*United States v. Goldenberg*, 168 U. S., 98, 103.)

SECTION 61 AN EXEMPTION FROM TAXATION IN FAVOR  
OF A SPECIAL CLASS.

In the present case there is not only no reason to suppose that the letter of section 61 did not "fully and accurately disclose the intent" of Congress, but there are several "cogent reasons for believing" that it did. In the first place, as the court below has held, the proposed rebate system would have operated practically as an exemption from taxation, which exemption would not have been general, as where an article formerly taxed is put on the free list, but a special exemption in favor of a certain class of persons using a certain article for certain purposes. The manufacturers using alcohol in the arts, etc., may constitute a large class, but they are by no means all the persons who use it, or even who use it for other than drinking purposes. Grain alcohol is used for



heating and cleansing purposes in every household that can afford it, and would be used for domestic purposes much more widely than it is if the high tax were removed. The abstract right of the ordinary householder to an exemption from tax upon the alcohol used to heat his teakettle or chafing dish, or for other domestic purposes, is precisely of as high a character as that of the manufacturer, and yet the latter alone was favored by section 61, the rest of the community going without relief. The British statute allowing denatured alcohol to be sold free of tax (43 and 44 Viet., c. 24; L. R. Stats., 1880, pp. 174 et seq.) makes no such discrimination, but treats manufacturers and other users of alcohol precisely alike.

The special exemption of manufacturers from the burdens of the spirits tax might have operated indirectly for the advantage of the general public, but so may every exemption from taxation, and this fact constitutes the only ground on which such exemptions can be defended. There is nothing in the character of the rebate system proposed by section 61 to distinguish it in this respect from any other special exemption from the burden of taxation, and hence the case must come within the rule that statutes granting such exemptions are to receive a strict interpretation. (Black on Interpretation of Laws, 322; *Winona and St. P. Land Co. v. Minnesota*, 159 U. S., 526.)

This rule is not confined to cases of exemption in favor of a particular individual or corporation. On the contrary, the cases of *State v. Mills* (34 N. J. L., 177), *Cincinnati College v. State* (19 O., 110), and *Academy of Fine*

*Arts v. Philadelphia Co.* (22 Pa., 496) furnish instances of the application of this rule to statutes affecting whole classes of individuals or of corporations; but even if there were no reported precedent to the contrary, the contention could not stand. The test must be not whether the exemption is in favor of a particular person or corporation, but whether it is special; and if it be not general, it must be special.

SECTION 61 TO BE CONSTRUED WITH REFERENCE TO  
THE LAWS FOR THE TAXATION OF SPIRITS.

The next reason for a strict construction of section 61 is furnished by its subject-matter. This section was not a complete law by itself, but was one of twenty-one sections relating to the same subject, viz, the taxation of distilled spirits, which twenty-one sections were but a portion of a mass of statute law all relating to this one subject. These sections imposed a higher tax on distilled spirits than that previously imposed, and they introduced certain new requirements in regard to regauging, general bonded warehouses, etc. The intention of these sections, taken together, was evidently to increase the revenue from distilled spirits, other than those used in the arts, etc., but to relieve from taxation (though by an indirect method) such spirits as were so used. That more revenue was desired from spirits used as beverages is just as clear as it is that it was intended to forgo the revenue that had previously been derived from spirits used in the arts, etc., and this fact must be borne in mind in construing section 61.

Moreover, the increased revenue from spirits not used in the arts had to be secured by means of the laws already in force regulating the distillation, storage, rectification, etc., of spirits, so that the provisions of these laws can not be lost sight of in the construction of the new sections. What this court has said in regard to tariff laws is equally true here, that "the whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress." *Salmonville Mills v. Russell* (116 U. S., 13). Practically, the effect of the preexisting laws upon section 61 was the same as if they, except so far as modified by the new sections, had been reenacted along with them, and the general tenor of the whole body of laws regulating the tax on distilled spirits may be said to be this—that they undertake to guard the revenue at every point and require the officers of the United States to certify to the doing of everything that is required to be done and to furnish in official form all the evidence that is called for. As this court recognized in *Felton v. United States* (96 U. S., 699, 703), the provisions of the spirits tax law are certainly "stringent."

In the collection of the tax on distilled spirits the Government satisfies itself by its own officers that everything is rightly done, and relies on no unofficial evidence whatever. From the moment that the official storekeeper begins to weigh the grain that is to be placed in a mash tub until the moment (it may be several years afterwards) when the spirits are removed from warehouse on payment of the tax, everything that is done is under the strictest

surveillance, and every known possibility of fraud is guarded against by some official act or record. To contend that Congress intended in section 61 that, in case for any reason the Secretary of the Treasury did not prescribe any regulations for the use of alcohol in the arts, etc., a manufacturer could go ahead and use it, and remove the stamps from the packages and present his claim for rebate, without any official proof of the actual use of the alcohol in the manner in which he claimed that he had used it, is to contend that Congress contemplated a practical nullification of the system of official control over distilled spirits, and the exposure of all the revenue that had been collected by an elaborate and costly system of precautions against fraud to the risk of being paid out again to parties who claimed it under a system that involved no such precautions whatever.

It is therefore clear that the intention of Congress, as expressed in section 61, construed with reference to the whole body of laws regulating the collection of the tax on distilled spirits, was to allow a rebate of the tax upon alcohol when used in the arts, etc., *provided* such rebate could be allowed without risk of loss of any of the revenue which the Government should receive from the tax upon alcohol not so used. The regulations contemplated by the section must have been regulations to insure the *bona fide* use, in the arts, etc., of all alcohol upon which the rebate was paid, and for the prevention of all payment of rebate upon alcohol not so used, and incidentally for the protection of honest liquor dealers against the admission into the market of any beverages composed of or containing alcohol upon which a rebate had been paid.

NECESSITY OF STRICT REGULATION IF REBATE WAS  
TO BE GIVEN.

The reason why the existence of regulations and compliance therewith were made a prerequisite to the right to receive a rebate is found in the peculiar nature of alcohol itself and in the previous experience of the Government in regard to the spirits tax. The annual reports of the Commissioner of Internal Revenue, transmitted to Congress by the Secretary of the Treasury and published to the world, form a history of more or less successful struggles with fraud, the nature of which and the means adopted to prevent it are set out at length in the report for 1875. Such documents as House Report No. 24, Fortieth Congress, second session, and House Miscellaneous Document No. 186, Forty-fourth Congress, first session, give some idea of the ramifications of the notorious "whisky frauds." Apart from the very full information that has from time to time been transmitted to Congress on this subject, it is a matter of common knowledge that the Bureau of Internal Revenue has had to contend with many difficulties in regard to this tax ever since it was first imposed, owing to the fact that the process of distillation is easy and the materials capable of being distilled are plentiful and cheap, so that if the tax, which is several times the value of the spirits distilled, can be evaded, the profit must necessarily be very great.

The teachings of experience have led to the development of a very complete and stringent system of law, under which no confidence is placed in any person, outside the Government service, who has anything to do

with distilled spirits, while it is sought to protect the Government at every point, and many acts are made criminal which in themselves involve no moral turpitude whatever. The law appears to proceed on the very sensible theory that people will be honest as long as it pays them to be so, and that if everything that is done with distilled spirits, from the time distillation begins until the tax is paid, is done under strict surveillance, fraud will be unprofitable, because it will involve the bribery of so many persons and will expose the fraudulent party to so many demands for blackmail.

When, therefore, Congress undertook to provide a system for refunding the tax on alcohol when used in the arts, etc., the strength of the temptation to evade payment of the spirits tax was well known to that body, and it was realized that without the enforcement of such regulations as should effectually protect that portion of the revenue which was derived from the tax on distilled spirits not used in the arts, etc., the loss through fraudulent claims for rebate would be very great. Hence ordinary caution required that no claim for rebate should be allowed until adequate regulations had been prescribed and compliance therewith had been satisfactorily proved. The language used in section 61 is calculated to secure this result, inasmuch as it provides, first, for the use of alcohol "under regulations to be prescribed by the Secretary of the Treasury," and, secondly, for proof of compliance with such regulations and of the use of the alcohol and the delivery of the stamps, while the right to receive a rebate is referred to last, evidently as a consequence

of and dependent upon the existence of the conditions referred to in the earlier portions of the section.

The appropriation acts show that nearly \$2,000,000 are annually spent in supervising the business carried on by distillers and rectifiers, besides over \$1,000,000 for the work of deputy collectors and revenue agents and the detection of frauds on the revenue. In spite of so large an expenditure and of the completeness of the system pursued (which may be judged of by the regulations in regard to the spirits tax and by the Internal Revenue Manual), attempts to defraud the Government are numerous, and exist in the large cities as well as in the more remote districts. The temptation to divert to purposes not warranted by section 61 the alcohol upon which a repayment of the tax is sought, or to obtain a rebate upon alcohol which has itself paid no tax, is at least as strong as it is to evade the payment of the tax in the first instance; so that the words "under regulations to be prescribed by the Secretary of the Treasury" must have been intended to mean regulations providing for a supervision as complete in its way as is the supervision under which spirits are manufactured. Just what those regulations should provide may be a fair question for argument, but as to the necessity of making them effectual there can be no question whatever. It would be absurd to suppose that Congress, after appropriating each year over \$3,000,000 to secure the collection of the tax on distilled spirits, would authorize the repayment of that tax in the case of spirits used for certain purposes, without so regulating and supervising such use as to make sure that no alcohol, the tax upon which was refunded, should

be used for any other purposes whatever. Any system under which alcohol could be used free of tax for purposes not within section 61 would not only cause great loss of revenue to the Government, but would also tend to drive honest dealers out of the spirits business altogether, as their tax-paid spirits could not compete in the market with spirits the tax upon which had been refunded. Moreover, no consideration of the advantages of free alcohol in the arts would induce Congress to sacrifice to any large extent the revenue now derived from distilled spirits, so that if it were found that a provision for free alcohol in the arts practically permitted the use of free alcohol for other purposes and seriously cut down the revenue, it would presumably be repealed at once, and hence it was to the interest of the users of alcohol in the arts, as well as of the United States, that the regulation of such use of alcohol be stringent enough to substantially prevent the use of any alcohol whatever free of tax, except only "in the arts or in any medicinal or other like compound," as provided by section 61. From every point of view, therefore, it was essential that the regulations contemplated by section 61 should be effectual to confine the use of the free alcohol to the purposes named in that section, and hence Congress can not have intended to allow any rebate in the absence of regulations.

SUBSEQUENT COURSE OF CONGRESS SHOWS NO INTENTION TO GRANT REBATE IN ABSENCE OF REGULATIONS.

Another reason for a strict construction of section 61 is found in the course subsequently pursued by Congress



in regard thereto. As soon as the act of August 28, 1894, became a law Congress adjourned, but at its very first meeting thereafter the Secretary of the Treasury reported a draft of such regulations as he desired to prescribe, stating at the same time that their enforcement would cost at least \$500,000\* annually, for which no appropriation was available, and that therefore he could not execute the section until Congress took further action. He also transmitted to Congress the correspondence between himself and the Commissioner of Internal Revenue, including the Secretary's letter of October 6, 1894, instructing the Commissioner to take no action in regard to the matter, an instruction which necessarily forbade him to entertain any claims for rebate. It is therefore manifest that Congress was distinctly informed that no such claims could be entertained unless it took some further action, and of precisely why further action on its part was necessary. The will of Congress was presumably the same in December that it had been the previous August, and had that will been that manufacturers should receive a rebate of the tax on alcohol whether the Secretary prescribed regulations or not, the declaration of the Secretary that he would entertain no claims for

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\*Appellant's counsel (Brief, p. 70) state that the Commissioner's letter of January 9, 1895, transmitted to Congress, "increased this sum to \$1,000,000 in one passage" and "to \$10,000,000 in another passage of the same communication," and they base a contention on the apparent inconsistency. This statement of what the Commissioner reported is unfair. The Commissioner mentioned \$10,000,000 merely to show what the expense of supervision would be for 32,000 users of alcohol, at the same rate as that previously estimated for the supervision of 1,600, but he then proceeded to show how the cost could be reduced to \$1,000,000.

rebate because he could prescribe no adequate regulations which he had the power to enforce would have been a declaration that he would frustrate the will of Congress, and would have met with speedy condemnation at the hands of that body. Legislation would at once have been enacted making it the duty of the Secretary to pay all such claims without regard to the adequacy of his regulations. That Congress, however, silently acquiesced in the Secretary's view is strong proof that he had not attempted to frustrate its will, but had acted entirely in accordance with that will from the first. In other words, the fact that Congress took no steps to require the Secretary to entertain such claims as the appellant's is itself conclusive proof that Congress had originally intended, in adopting section 61, that unless the Secretary found it possible to prescribe and enforce satisfactory regulations, and did so prescribe them, no claims for rebate should be entertained or paid. The only other conclusion to be drawn from the facts is either that Congress changed its mind, between August and December, as to the meaning of section 61, or else that that section did not really express the intention of Congress at all, and that that body availed itself of the Secretary's construction of the law in order to avoid the consequences of a piece of unintentional legislation. Neither of these alternative conclusions, however, is permitted by any doctrine of statutory construction, every statute being presumed to express the intention of the enacting body, and the mind of that body being always presumed to be consistent with regard to any statute, at least as far as concerns its meaning.

Both the action and the inaction of Congress, after it had received the Secretary's report, clearly indicate an intention that inasmuch as section 61, if carried into operation, would involve the appropriation of a considerable sum, it should not be carried out. The deficiency appropriations for the work of the Internal Revenue Bureau for the year 1894-95 were trifling in amount (except as to the income tax) and specifically limited in application, while the appropriations for that work for the year 1895-96 were no greater than for the previous year, except where certain additional work was specifically provided for. Finally, on June 3, 1896, Congress repealed section 61 altogether and authorized the appointment of a joint select committee to "consider all questions relating to the use of alcohol in the manufactures and arts free of tax, and to report their conclusions to Congress," with power to summon witnesses, administer oaths, print testimony, etc. (29 Stats., 195.)

Congress could not have put itself on record much more effectually than it has done as agreeing with the Secretary that the section could not be carried out. That it did not sooner repeal the section is presumably due to the fact that it at first considered that no repeal was necessary, the act simply remaining inoperative until the requisite appropriation should be made, but that finally, being informed by the Attorney-General in December, 1895, of the number of suits that were being brought in the Court of Claims under that section, it realized the desirability of putting a stop to all further misconception of its position. The appointment of a special committee

to make a thorough investigation of the whole matter is also some evidence that Congress held that, besides the lack of an appropriation, the use of alcohol in the arts free of tax had not been adequately provided for in section 61, and that the matter was one that needed to be dealt with only after the most thorough investigation.

CONTRAST FURNISHED BY ACTION OF CONGRESS IN  
REGARD TO THE INCOME TAX.

The action of Congress as to section 61 is in striking contrast with its action as to section 9, where the expense of supervising the manufacture of goods from tax-free materials for export was carefully provided for, but it is in still more striking contrast with its action in regard to sections 27 to 36, which imposed an income tax. As originally passed, these sections, involving the employment of a number of additional deputy collectors and agents, made no provision for paying them, leaving the Secretary of the Treasury in this respect practically, though not legally, in the same position that he occupied as to section 61. The necessary office work could lawfully have been done under the appropriation for the Commissioner's office, and as the work to be done by collectors, deputy collectors, clerks, and agents throughout the country was for "collecting internal revenue," the force then employed could lawfully have been used to collect the income tax, but practically, as that force was already fully employed, and there was no authority to employ additional men, nor any money to pay them, an appropriation was just as necessary as for the purposes of section 61. To supply this need the Secretary of the

Treasury, in his estimate of urgent deficiencies, transmitted to the Speaker of the House of Representatives, December 4, 1894, stated that in order to collect the income tax during the six months ending June 30, 1895, \$15,295 were needed for increased force in the office of the Commissioner of Internal Revenue, \$211,800 for deputy collectors, and \$18,000 for agents. (See Rec., 21.) These needs were supplied by the urgent deficiency bill of January 25, 1895 (28 Stats., 637), but until that appropriation was made little could be done to carry the income tax sections into effect without seriously hampering the other work of the Bureau, and it is matter of history that the joint resolution of February 21, 1895 (28 Stats., 971), prolonging by six weeks the time for making returns, was made necessary by the delay in making the appropriation.

This action in regard to the income tax is a very strong indication of the intention of Congress that section 61 should not be carried into effect during either the fiscal year 1894-95 or that of 1895-96. To start the operation of the income-tax sections, no new item of appropriations was required. All that was needed was an increase of appropriations already made, in order to enable the new tax to be collected without interfering with the collection of the taxes previously authorized; and that increase was voted in due season. With section 61, on the contrary, nothing could be done, beyond the drafting of regulations in order to be ready to carry out the law when Congress should supply the means to do so; and Congress supplied no such means. Its inaction was not fortuitous, but intentional.

## ABSENCE OF A FORMAL ESTIMATE IMMATERIAL.

Appellant's counsel contend, however (Brief, p. 70), that "no conclusion unfavorable to the continued force of the law can be drawn" from the failure to make appropriations for it, and this because "no formal estimate" of such an appropriation "was ever submitted by the Department." This contention is extraordinary, in view of the well-known practices of Congress. The act of July 7, 1884, § 2 (23 Stats., 236, 254), referred to in support of the contention, is intended to govern the Secretary of the Treasury, and not Congress itself. The former's failure to include an estimate for the expenses under section 61 in his deficiency estimate was possibly due to the fact that he did not believe that Congress, when once informed of the expenditure required, would make any appropriation. Possibly, also, he considered the data at his command inadequate for the framing of an estimate according to the accepted standard of accuracy. Be this as it may, he gave Congress the benefit of all the data then before him, and soon afterwards promptly responded to a call for further information (Sen. Ex. Doc. No. 34, 53d Cong., 3d sess.), and the inaction of Congress loses none of its significance by reason of the particular way the information as to the need of an appropriation was communicated.

That appropriations are largely based on the Treasury estimates is true, but it is equally true that special estimates are called for from time to time, and also that very large sums are often added to appropriation bills without any Treasury estimate at all; and the contention that

Congress intended that section 61 should be carried out, with all the expenditure necessary for that purpose, but failed to make the appropriation because it was officially informed of the need of it in one way rather than in another, is wholly without foundation.\*

CONTRAST FURNISHED BY ACTION OF CONGRESS IN  
REGARD TO SEED DISTRIBUTION.

Were further argument needed to prove that the inaction of Congress in regard to alcohol in the arts, after receipt of the Secretary's finance report, manifests the concurrence of Congress in his view of section 61 and in the course which he pursued in regard thereto, it would be found in contrasting this inaction with the action of the same body in an instance of nonconcurrence with the conclusions of an executive officer. In his report for 1895 (House Doc. No. 6, Fifty-fourth Congress, first session) the Secretary of Agriculture called attention to "the needlessness and folly of the annual, gratuitous, and

\* Appellant's counsel (Brief, p. 70) further assert that the correctness of their position—

is shown by the fact that a proposition in the Senate to make an appropriation for this very purpose was laid on the table on the precise ground that no Treasury estimate had been submitted for it. (Cong. Rec., 53d Cong., 3d sess., part 2, page 1027.)

In view of the decision in *United States v. Trans-Missouri Freight Association* (165 U. S., 290, 316), no such reference to the debates in Congress is permissible; but were this otherwise it would be found that the above statement is incorrect; it would be seen that the proposed appropriation was tabled, not because there was no estimate, a matter which was only referred to incidentally, but because section 61 could not be carried into effect without "some additional legislation."

promiscuous distribution of seeds deadheaded through the United States mails," and stated that as he had received no satisfactory bids for supplying for distribution such rare and uncommon seeds and valuable trees, plants, shrubs, vines, and cuttings as he considered the law required, he had made no distribution of seeds, trees, etc., for the fiscal year 1895-96, so that the appropriation of \$130,000 for the purchase and distribution of seeds, etc., was "entirely intact and consequently undrawn from the Treasury of the United States." Instead of silently acquiescing in the Secretary's course, though backed by arguments of no small weight, Congress promptly resolved—

That the Secretary of Agriculture be, and he is hereby, authorized and *directed* to purchase and distribute valuable seeds for the year eighteen hundred and ninety-six, as has been done in preceding years; and \* \* \* the Secretary of Agriculture is hereby *directed* to procure them by open purchase or contract at the places and in the manner in which such articles are usually bought and sold. \* \* \* (29 Stats., 467.)

Moreover, in making appropriations for the Department of Agriculture for the next fiscal year, Congress increased the appropriation for seeds, etc., by \$20,000 over the previous appropriation, adding the significant words—

And the Secretary of Agriculture is hereby authorized, empowered, *directed*, and *required* to expend the said sum in the purchase, propagation, and distribution of such valuable seeds, bulbs, trees, shrubs, vines, cuttings, and plants, and is authorized,



empowered, *directed*, and *required*, to expend not less than the sum of one hundred and thirty thousand dollars in the purchase at public or private sale of valuable seeds, the best he can obtain, and such as are suitable to the respective localities to which the same are to be apportioned. \* \* \* (Act of April 25, 1896; 29 Stats., 99, 106.)

Besides directing and requiring the Secretary to distribute the seeds, etc., Congress amended section 527 of the Revised Statutes so as to make it conform in terms to the loose construction that had for some years been put upon it, and which the Secretary had condemned in his report.

Whatever be thought of the wisdom of Congress in the matter of seed distribution, its action in 1896 clearly shows that that body does not hesitate to assert and enforce its views of the law in the most effectual way when such views are controverted and the Congressional intention thwarted by an executive officer. In any conflict between the legislative and executive branches of the Government the former has never shown any disinclination to maintain its position at all hazards, and there is no reason to suppose that the Fifty-third Congress was any more ready to surrender its convictions than any of its predecessors or successors have been. When, therefore, a statute calls for action by an executive officer, and he reports that such action is impracticable until Congress takes further steps, and that in the meantime the law must remain inoperative, and Congress does nothing further, the conclusion is irresistible that the understanding of Congress as to the operation of the law is and was

*all along the same as that of the Executive, and that it did not intend, even at the time that it enacted the law, that it should go into practical effect unless the Executive took such action as its provisions called for,*

CONTRAST BETWEEN LANGUAGE OF SECTION 61 AND  
THAT OF THE DRAWBACK LAWS.

The language of section 61 is in striking contrast to that of sections 3015, 3019, 3026, 3329, and 3386 of the Revised Statutes in regard to drawback, which provide, in the first place, that a drawback shall be allowed; and, secondly, that it shall be ascertained under such rules and regulations as may be prescribed; whereas section 61 provides first for the use of alcohol under regulations, before any words are used indicating an intention to grant a rebate. This difference in the wording of the statutes is very far from being "a mere verbal difference," as appellant's counsel contend (Brief, p. 55), but is necessitated by the fundamental differences in purpose and object.

Drawback laws are concerned solely with what is done with an article, *after* its manufacture, without any regard to the process of manufacture whatever. The mere use of imported material in manufacturing does not entitle the manufacturer to a drawback, and hence the drawback laws do not undertake to regulate any manufacturing business. It is only when the manufactured goods are exported, when that which has been brought into the country is taken out of it (in a different form, it may be, but the same substance), that a reason for a repayment of duty arises. In such cases all that requires regula-

tion is, first, the exportation itself, which is regulated primarily by statute (U. S., §§ 3028-3057, and the several amendments thereof), and secondly, the ascertainment of the character and quality of the imported materials existing in the manufactured article; and the decision in *Campbell v. United States* (107 U. S., 407), upon which the appellant seeks to rest his case, and which will be discussed more fully below, is concerned solely with regulations as to this second matter.

The right to drawback is undoubtedly conditioned upon compliance with the statutes regulating exportation, and if they are complied with it is comparatively unimportant how the quantity of imported material that is exported is ascertained, provided it be done correctly, and hence there was no need of conditioning the right to drawback upon compliance with regulations in regard to such ascertainment.

Section 61, on the contrary, is concerned solely with manufacturing, without any regard to what is afterwards done with the manufactured article, except that in certain cases it would be necessary to so regulate the processes of manufacture as to make subsequent recovery of alcohol from the manufactured article impracticable. The rebate was not granted for the quantity of alcohol existing in a manufactured article (as the drawback is granted for the quantity of imported material existing in the exported article), but on account of the use of alcohol in manufactures as distinguished from its use as a beverage, or, in other words, on account of the manufacturing, and hence it was the manufacturing which required regulation. To insure compliance with the

regulations of manufacture in all cases in which a rebate was to be claimed, the rebate was granted for a regulated manufacturing only, and, there having been no regulated manufacturing, there can be no rebate. Hence, a vital difference exists between the present case and the drawback cases, where the regulations did not concern the matter for which the drawback was granted (i. e., the exportation), but only a purely auxiliary matter of proof. To say, as appellant's counsel do (Brief, p. 55), that the regulations required by section 61 "are simply designed to ascertain the quantity of "alcohol used in manufactures and medicines," is to misconstrue the intention, as well as the language, of the section; but even if the regulations contemplated by section 61 had to do merely with the ascertainment of the quantity of alcohol used, this would be very different from the ascertainment of the quantity existing in the manufactured article, as in the case of a drawback.

The right to rebate under section 61 is clearly made the consequence of the use under regulations. The words "under regulations to be prescribed by the Secretary of the Treasury" impose an express condition upon that use of alcohol which is to entitle the user to receive a rebate. This is a case where the maxim *expressio unius est exclusio alterius* manifestly applies. The precise application of this maxim depends, of course, upon the language and the circumstances of each case; but the general conclusion from the authorities has been stated to be that this maxim "was never more applicable than when applied to the interpretation of

a statute" (Brown's Leg. Mas., 8th ed., § 661); while another writer has pointed out that "it is particularly applicable to the construction of such statutes as create new rights or remedies \* \* \* or otherwise come under the rule of strict construction." (Black, Interp. of Laws, 147.) It has already been shown that section 61 necessarily comes "under the rule of strict construction," and that it does so because it creates new and exceptional rights; so that the words "under regulations to be prescribed" must be understood as imposing an express and exclusive condition, equivalent to what would be expressed by the words "*if* any manufacturer, finding it necessary to use alcohol in the arts, shall use the same under regulations to be prescribed by the Secretary of the Treasury."

To contend that section 61 was intended to provide for a rebate *if*, owing to the fact that no regulations had been prescribed, the alcohol was not used "under regulations," practically involves a change in the language of the section, a construction which would treat it as if it read thus:

Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, *if he prescribe any, but if he do not, then the manufacturer may use alcohol without being subject to any regulations whatever*, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations, *in case they shall have been prescribed*, and has used such alcohol therein, etc.

The words above inserted (and which *must* be read into the section if a literal construction is to be abandoned) wholly destroy the effect of the provision which Congress expressly adopted, thereby utterly disregarding the rule as to *expressio unius*. Whatever be the limits of the application of that rule, one thing is certain, viz, that in the construction of statutes nothing can be implied which is at variance with what is expressed. Provisions that something may be done "under regulations to be prescribed" and that it may be done under regulations, if prescribed, but otherwise without regard to regulations, are clearly at variance, since the plain meaning of the first is that there must be regulations in order to allow of the thing being done, or, at least, to allow of the desired consequences attaching.

According to the plain meaning of section 61, therefore, the regulations must first be prescribed, and the manufacturer who wishes to obtain a rebate must use his alcohol under those regulations, before he can make his proof of such use to the collector, while the collector must be satisfied that the regulations have been complied with, as well as that the alcohol has been properly used, before the manufacturer can have any right to a rebate of the tax represented by his stamps. This section does not itself grant an absolute right to any manufacturer or class of manufacturers to receive a rebate, but makes the whole matter dependent upon the issuance of regulations by the Secretary, and upon the use of alcohol under such regulations.

THE REQUIREMENT THAT REGULATIONS MUST FIRST  
BE PRESCRIBED INVOLVED NO DELEGATION OF  
LEGISLATIVE POWER.

While it is perfectly true that the right of a manufacturer to rebate under section 61 is "fixed by statute and not by regulation," yet as the statute requires the manufacturing to be done "under regulations," in order that the right may exist, it is the statute itself which postpones the existence of the right until the Secretary of the Treasury has performed the act called for by the statute, viz, the prescribing of regulations. As already shown, the statutes passed upon in *United States v. McLean* (95 U. S., 750) and *United States v. Verdier* (164 U. S., 213) required an executive act to be performed before the rights granted by those statutes could exist. Another class of statutes bearing considerable resemblance to section 61 are those which provide that they are to go into effect, or to take effect in one way rather than another, upon the happening of certain contingencies, the existence of which is to be ascertained by the Executive. That such acts do not involve any delegation of legislative power was decided in *Brig Aurora v. United States* (7 Cranch, 382), and the law on this subject is considered at length in *Field v. Clark* (143 U. S., 649, 680-694), where a provision was under consideration which in effect required the President to examine the commercial regulations of other countries producing and exporting sugar and certain other articles and *form a judgment* as to whether or not they were reciprocally equal and reasonable in their effect upon American products,

and that if he deemed the regulations of any such country to be reciprocally unequal and unreasonable he should proclaim the fact, and thereafter the duties upon the sugar and other specified articles of such country should be levied at certain rates, which were higher than those at which similar imports from other countries were taxed. It was there held that such a provision did "not, in any real sense, invest the President with the power of legislation," but merely with the ascertainment of certain facts. In the ascertainment of those facts the President necessarily exercised his judgment and discretion to decide what were and what were not reciprocally unequal and unreasonable regulations, and according to his decision in any case the higher rate of duties would or would not take effect, but that involved no exercise of legislative power.

Although in section 61 Congress did not in so many words enact that the rebate provision should only take effect in case the Secretary ascertained that effective regulations could be enforced by him with the power then at his disposal, yet practically this was precisely what was done. Congress desired to relieve manufacturers from the tax levied upon the alcohol which they used in the arts, etc., but it did not wish to risk losing any of the tax upon alcohol not so used, and hence it required the Secretary of the Treasury to first prescribe regulations adequate for the attainment of this double purpose. The first effect of this requirement was simply to call upon him to ascertain whether he could, by any regulations which he then had the power to enforce, restrict the proposed rebate upon alcohol within the limits desired by



Congress. The existence of power on his part to enforce such regulations as would restrict the use of free alcohol to the purposes contemplated by Congress was the fact which the Secretary was to ascertain, just as in *Field v. Clark* the existence of reciprocally unequal and unreasonable regulations was the fact which the President was to ascertain. Judgment and discretion had to be exercised in both cases, and in both cases the existence of the fact which had to be ascertained was necessarily more or less a matter of opinion. Even if it might be shown that in the one case the question to be settled was more complicated and difficult than the other, and involved a greater exercise of judgment in reaching a conclusion, this would constitute a difference of degree between the two cases, but not one of kind.

Some of the acts cited in *Field v. Clark* to illustrate the doctrine there upheld bear a remarkably strong analogy to section 61. The acts in regard to the importation of neat cattle and hides, beginning with that of March 6, 1866 (14 Stats., 3), have always provided that whenever the Secretary of the Treasury determined, as to cattle from any particular country, that such importation from that country would not lead to the introduction or spread of contagious or infectious diseases among the cattle of the United States, and proclaimed the fact, the importation from such country should be allowed. Whether the importation of cattle and hides from any given country would be safe or not must always be a question of opinion to be decided by the Secretary according to his best judgment, and whether such regulations as the Secretary could enforce as to the use of

alcohol in the arts would be effective or not is a similar question of opinion. If, as this court evidently considered, it involved no delegation of legislative power to make the right to import cattle and hides depend on what the Secretary, in his judgment, should decide, it would seem equally permissible to make the right to a repayment of the alcohol tax dependent upon the Secretary's decision as to what was feasible.

REASONS FOR RESTRICTING THE REBATE TO CASES OF  
USE UNDER REGULATIONS.

*History of section 61.*

The restriction of the rebate to cases of use under regulations, though virtually making the operation or nonoperation of section 61 depend upon the ascertainment of a fact by the Secretary of the Treasury, was warranted by the circumstances of the case. The laws in regard to the tax on distilled spirits constitute, as already stated, a very complete and detailed code, which is carried out by a very elaborate system of regulations, and it is clear that Congress did not intend to weaken the effect of these laws and regulations in general, or to modify them in any way except in so far as might permit of the use of alcohol in the arts, etc., free of tax without detriment to the revenue from the tax upon spirits used for all other purposes. The problem was *how* to permit it.

That Congress held this to be a serious problem is shown by the history of previous attempts to secure free alcohol for use in the arts. A bill to provide for this was introduced in 1882, and the subject was discussed, but no conclusion reached. (13 Cong. Rec.,

5325, 5360-5364.) Other similar bills were introduced in 1886, but seem not to have been reported on by any committee. (17 Cong. Rec., 341, 394, 582.) A report on the subject was made by the Senate Committee on Finance at the second session of the Fiftieth Congress (Sen. Doc. No. 2332), and a bill to provide for the use of alcohol in the arts, etc., free of tax was inserted by the Senate at that session in House bill No. 9051, the well-known "Mills bill," but failed to pass the House. The very day before section 61 was offered as an amendment to the act of which it became a part, a much more elaborate amendment to provide a system for the use of alcohol in the arts, etc., free of tax was proposed and rejected. (26 Cong. Rec., pp. 6935-6936.) Comparing the rejected amendment with section 61, it will be seen what the Senate was willing to enact and what it was not willing to enact. The rejected amendment provided for bonded alcohol warehouses, the removal of alcohol therefrom to storerooms connected with manufactories, the keeping of alcohol in such storerooms in charge of a revenue officer, its removal and use subject to supervision, its methylation, etc. Bearing in mind that when the Senate rejected these provisions and adopted section 61 it could not have intended to run any risks as to the revenue from the tax on spirits not used in the arts, etc., or to open any doors for fraud on the revenue or on the liquor dealers, it is clear that it could not have rejected the provisions first presented to it because it considered them too strict, but because it considered that the experiment of allowing the use of alcohol

in the arts, etc., free of tax could be tried more satisfactorily if the whole matter were left to the Secretary of the Treasury to regulate than could be done if Congress undertook to provide one rigid system and confine the Treasury and the manufacturers to that. The Secretary's regulations were to take the place of the statutory enactments that were proposed and rejected, and compliance with the former was to be just as essential to the existence of a right to a rebate as compliance with the latter would have been had they been adopted.

If it be urged that this was an unusual course for Congress to pursue, the explanation lies in the unusual circumstances of the case. A radically new measure was to be tried, all over the country at the same time, in regard to a matter which required the utmost care and precaution in dealing with it, as any looseness of method would not only expose the Government to enormous losses, but would put all honest dealers in spirits at the mercy of unscrupulous persons. Under these unusual circumstances, Congress not unnaturally preferred not to hamper the experiment by any regulations which could not be altered without further Congressional action, but to leave the whole matter to the Secretary of the Treasury, to be regulated by him in accordance with his best judgment, or to be left alone if the Secretary considered that without the exercise, on his part, of powers which Congress had not yet seen fit to give him, the experiment could not safely be tried at all.

The provisions of section 61 are very different from those of the bill introduced in 1882, but not passed, providing that the Secretary of the Treasury should grant

permission to any firm, individual, or corporation to withdraw alcohol from bond, free of tax, "for the sole purpose of use in industrial pursuits, under such rules and regulations as the Commissioner of Internal Revenue may prescribe, with the approval of the Secretary of the Treasury." (13 Cong. Rec., 5325, 5360.) That bill proposed to give manufacturers a right to receive the alcohol and to permit the Commissioner to prescribe regulations, but did not make the right to receive the alcohol dependent upon any regulation whatever. It was, of course, objected to as impracticable, because as neither the Commissioner nor the Secretary could prescribe penal regulations they would have no real control over the use of the alcohol after it had once been received. Section 61 granted no right to receive any rebate until the collector should have been satisfied that the regulations had been complied with and the alcohol legitimately used. It made the right to rebate dependent on compliance with regulations, and hence on the existence of regulations; but it in no way increased such power as the Secretary then had to enforce regulations, and practically it called upon him first, as already stated, to ascertain whether, with that power, any regulations which he might make would be adequate.

The history of section 61 itself shows that this is the true construction to put upon it. This history is in striking contrast with that of the rest of the act of August 28, 1894. Besides the time spent by the Committee on Ways and Means in preparing the act, it was before Congress for eight months, during six and a half of which the separate sections were considered at length and debated

over in the House and in the Senate. This particular section, however, was inserted by the Senate after the act had been before that body for four months and a half, and just before final passage, after very brief debate. On June 28, 1894, Senator Hoar gave notice of an amendment, which consisted in the insertion of this section, which amendment was moved and agreed to the next day. (Cong. Rec., vol. 26, pp. 6956, 6982, 6985.) On July 3, 1894, the amended bill passed the Senate (*id.*, 7136), and although the House did not concur in the Senate amendments until August 13, after two conferences (*id.*, 8468), it is a matter of history that the issue between the House and the Senate concerned certain particular duties, notably those on sugar, coal, iron ore, and barbed wire, and that the bitterness of the contest about these prevented any discussion of the other features of the bill.

Now, it is perfectly apparent that, in the few moments that the Senate gave to the consideration of this section by itself, the House giving none at all, Congress did not undertake to devise a complete and practical scheme whereby alcohol in the arts, etc., should be freed from taxation while the tax on all other alcohol should be collected as efficiently as before. What the history of this section shows is, that Congress desired to make alcohol free when used in the arts, but was uncertain whether this could be done with safety to the revenue or not, and therefore determined to provide a possible plan, leaving it to the Secretary of the Treasury to say whether, with the powers at his disposal, the object of Congress could be attained.

Appellant's counsel insist (Brief, pp. 94-100) that the Secretary of the Treasury could not have been compelled by mandamus to prescribe regulations under section 61, owing to the exercise of discretionary power necessarily involved in such an executive act. As the granting of a mandamus in any case is so largely a matter within the discretion of a court, it is difficult to assert positively beforehand, as to any case, that a mandamus could or could not issue. Assuming that appellant's counsel are right, however, their view only serves to refute their main contention, which is that as long as the alcohol has been used in the arts it is immaterial, as regards the rights of this and the hundreds of other claimants, that the Secretary has prescribed no regulations. If Congress vested the Secretary with such broad discretion as to the regulations he should prescribe, that mandamus would not lie to compel him to prescribe any at all, why was this done? Manifestly because Congress wished that the regulations should be the most effective which the Treasury Department, with its years of experience with the spirits tax, could devise for the protection of the Government against fraudulent claims or the subsequent recovery of the alcohol, and that new regulations should be prescribed from time to time as experience should suggest. Congress had no wish to tie the Secretary's hands in this matter of regulations in any way, as the subject was one of such vast importance. This being so, it is simply inconceivable that Congress should have intended, by the words "may use the same under regulations to be prescribed by the Secretary of the Treasury," that a rebate should, in any case, be granted for an unregulated use of the alcohol.

*Necessity of regulations.*

The question as to what might have been the appellant's rights if the Secretary had simply disregarded the law and refused to ascertain the fact upon which the operation of the law depended can not arise, because the Secretary did not so act. On the contrary, he reported to Congress at the earliest possible day that he had fully considered the subject and had made an unsuccessful attempt to frame such regulations as would, without official supervision, protect the Government and the manufacturers, but that the act was defective in not appropriating any money for the administration of section 61; or, in other words, that it had given him no power to enforce such regulations as alone would be effective. (Rec., 9.) Furthermore, he showed to Congress precisely what sort of regulations he would wish to enforce if he had the power and how much he believed such enforcement would cost, and Congress, as has been already seen, acquiesced in his conclusions.

It can not seriously be contended that the proposed regulations were not substantially such as Congress contemplated. The necessity of regulation appears on the face of section 61 itself. The words "manufacturer," "alcohol," "arts," "medicinal compounds," and "like compounds" are exceedingly broad terms, and must all be officially defined. Such standard definitions as the following would permit the section to operate far more extensively than Congress could possibly have intended:

*To manufacture.* To make or fabricate anything for use, especially in considerable quantities or numbers, or by the aid of many hands or of machinery. (Century Dictionary.)



Manufacture is transformation—the fashioning of raw materials into a change of form, for use. (*Kidd v. Pearson*, 128 U. S., 1, 20.)

The word [“manufacture”] is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. (*Tide Water Oil Co. v. United States*, 171 U. S., 210.)

*Art.* A system of rules and traditional methods for facilitating the performance of certain actions; acquaintance with such rules, or skill in applying them.

*Medicinal.* Having the properties of a medicine; adapted to medical use or purposes; curative; remedial. (Century Dictionary.)

A rectifier is a manufacturer within the above definitions, and rectification an art. It is probable that the definition of “manufacturer,” proposed by the Treasury Department (Rec., 10), was more restrictive than the statute contemplated, but some definition was necessary. The boundary line between medicinal and nonmedicinal compounds is very indistinct, and the use of the words “other like compounds” makes it peculiarly difficult to determine the limits which Congress intended to set to the operation of the section. As an illustration of the difficulty, it may be pointed out that although Angostura bitters, Amer Picon, and Benedictine have all been held to be spirituous preparations within the meaning of tariff laws (*Dallet v. Smyth*, 6 Blatch., 419; *Curiel v. Beard*, 44 Fed. Rep., 551; *In re Gourd*, 49 id., 728), yet lately a similar preparation, Boonekamp bitters, containing 47½ per cent of pure alcohol by weight, i. e., being very nearly

proof spirit, were held taxable as proprietary preparations and not as "other similar spirituous beverages or bitters," they being prepared by a secret formula. (*Ehrhardt v. Steinhardt*, 153 U. S., 177.) In *Wuppermann v. Ehrhardt*, a suit brought about the same time in regard to Angostura bitters, but not appealed, a similar conclusion was reached. These later cases indicate that many kinds of bitters, though chiefly used as beverages, might be alleged to come within the term "medicinal or other like compounds," and render it very difficult to prevent any law worded like section 61 from being used for the practical elimination of the distilled-spirits tax from the source of revenues.

There is no statutory definition of alcohol as regards strength, section 3248, Revised Statutes, defining it merely with reference to its general nature. In popular usage, alcohol is any liquor containing the spirit described in that section. (See *Century Dict.*) Hence the word "alcohol" under section 61 might be claimed to mean a spirit of any degree of proof, no matter how low.

*Risks involved in the rebate system.*

The use of such exceedingly vague terms as are found in section 61 necessitated not merely an official definition of them, but the exercise of governmental supervision over all operations conducted under the section, in order to prevent those operations from going beyond the scope of the law as intended by Congress and as officially defined. Moreover, even where the manufacture was itself within

the contemplation of section 61, supervision was necessary to insure a proper use of the alcohol in such manufacture.

The frauds which have been committed in regard to the spirits tax involve two kinds of operations, viz, illicit distilling and the rectification of illicit spirits. While illicit distilling, apart from rectification, has always been carried on more or less, the strict surveillance exercised over distilleries suffices to prevent it to a very large extent as long as the illicit product can be kept from coming into the hands of rectifiers or from being palmed off by them, after rectification, as if a tax had been paid thereon. Without proper checks on rectification, however, the temptation to fraud would be very great and the effect of any system of surveillance seriously impaired.

The risks to which the revenue would be exposed by the existence of a right to claim a rebate of the tax upon alcohol when used in the arts, etc., are very similar to those to which it is exposed at the hands of distillers and rectifiers, and should be guarded against in much the same way. The main features of the system pursued as to the latter are described in the Internal Revenue Report for 1875, and they may profitably be compared with what has been done in the present case.

The report (p. XVI) states how a distiller, by the connivance of the storekeeper, can make two fermentations within the time allowed for one, and thus obtain nearly double the quantity of spirits shown by his books. To use this illicit product he would get it into the hands of an officer, supplying him with stamps which had already been used and which should have been destroyed, but

had been preserved. This avenue for fraud was ultimately cut off by requiring all spirits to be officially inspected and gauged before rectification, and a detailed report of all the packages, by their various identifying marks, made out, and a portion of each tax-paid stamp returned with the report, and also by forbidding the issuance of rectifiers' stamps for more than the number of proof gallons determined by actual gauge. (*Act of July 16, 1892*, 27 Stats., 200; Regulations, pp. 85-88.) A similar official inspection and gauge would be equally necessary under section 61, because without it manufacturers could procure packages from which the alcohol had been wholly or partially emptied, and remove the stamps therefrom and present them for rebate.

In point of fact, if there were no inspection of the alcohol received, either by rectifiers or by manufacturers, fraud would be much easier with the latter than with the former. Rectifiers would have to consummate their fraud by the use of illicit spirits, the procuring of which would itself be an illegal act and subject to risk of detection and punishment, while manufacturers could either merely pretend to use more alcohol in their business than had actually been used (and in many cases the fraud could be concealed by simply diluting the alcohol used), or they could use wood alcohol, a legitimate but untaxed substance, the possession of which would expose them to no risk, and which can for many purposes be used in the place of grain alcohol.

In the case of rectifiers the only possibility of fraud is in the issuance of rectifiers' stamps for more than the actual quantity of tax-paid proof gallons, and the subsequent

use of such extra stamps to cover up illicit distillation. The official inspection and gauging at the time of rectification prevent this, so that the Government need not follow the spirits to see what becomes of them. Under section 61, however, an initial inspection and gauging, although absolutely necessary, would still be inadequate, because while it would determine the actual quantity of tax-paid alcohol that came into the factory, it would not prevent the manufacturer from using the alcohol for other purposes than those which come legitimately within the terms "the arts, or any medicinal or other like compound." The only possible way to prevent such misuse of the alcohol as effectually as illicit distilling is prevented would be to adopt the same means, viz, continuous surveillance by a Government officer.

*Removal of stamps a criminal offense.*

To further illustrate the absolute necessity of official supervision, it may be pointed out that section 61 involves, as to every package of spirits used in accordance therewith, the commission of acts which for more than twenty-six years, i. e., ever since July 20, 1868, had been felonies. Revised Statutes, section 3324, provides as follows:

Every person who empties or draws off, or causes to be emptied or drawn off, any distilled spirits from a cask or package bearing any mark, brand, or stamp required by law shall, at the time of emptying such cask or package, efface and obliterate said mark, stamp, or brand. \* \* \* Every person who fails to efface and obliterate said mark, stamp, or brand at the time of emptying such cask or

package, \* \* \* or who removes any stamp provided by law from any cask or package containing, or which had contained, distilled spirits without defacing and destroying the same at the time of such removal, or who aids or assists therein, or who has in his possession any canceled stamp, or any stamp which has been used, or which purports to have been used, upon any cask or package of distilled spirits, shall be deemed guilty of a felony, and shall be fined not less than five hundred dollars nor more than ten thousand dollars, and imprisoned not less than one year nor more than five years.

In indictments under the above clauses of the section intent need not be shown (*United States v. Ulrici*, 3 Dill., 582), so that mere knowledge that the stamps were not obliterated, and voluntary omission to obliterate them, leaves the jury no option but to convict (*Quantity of Distilled Spirits*, 20 Fed. Cas., 116), and the mere having in possession a stamp once in use which has accidentally fallen off a package is an offense within the section. (*United States v. Spiegel*, 116 U. S., 270, 276.) Employers, including every member of a firm of employers, are indictable under this section for any violation of it by an employee. (*United States v. Adler*, 24 Fed. Cas., 764.)

Granting that section 61 was intended to modify section 3324 to some extent, and would protect anyone in removing stamps or having them in possession, provided he could prove that he came within its operation in so doing, the fact remains that section 3324 bears witness to the great risks to the Government which the removal of stamps or having them in possession after removal

would involve, and also to the risks to which persons who undertook to remove or keep such stamps for use under section 61 would be exposed. In the present case, not merely the appellant, but the employee who actually removed the stamps, and everyone through whose hands they have passed, is liable, not merely to indictment, but to conviction for a felony, unless he can prove that he acted by authority of section 61. To protect manufacturers and their employees, as well as to protect the revenue, it would be indispensable to have some means of fixing officially the character of all stamps upon packages used under section 61, as well as of the packages themselves from the moment such packages are obtained for such use, so as to distinguish them from other stamps and packages. It would probably be equally indispensable to require the stamps to be removed by a revenue officer, who should mark them in some way that would explain their removal. These points were covered by the regulations proposed by the Secretary of the Treasury (Arts. 16, 17, 24; Rec., 16-17, 19), but which he was unable to put in force.

#### SUPERVISION REQUIRED IN THE CASE OF BONDED MANUFACTURING WAREHOUSES.

The practice in regulating the use of materials free of tax in the manufacture of articles for export indicates the course which Congress must have intended should be followed under section 61. The *Act of June 20, 1864*, section 168 (13 Stats., 296), provided that "medicines, preparations, compositions, perfumery, cosmetics, lucifer

or friction matches, and cigar lights, or wax tapers, cordials and other liquors manufactured wholly or in part of domestic spirits, intended for exportation," might be manufactured free of tax in bonded warehouses under regulations to be prescribed by the Secretary of the Treasury, and that materials allowed to be exported free of tax or duty could be used in such manufactures without payment of tax or duty. The *Act of March 3, 1865*, section 1 (13 Stats., 482), forbade the manufacture of matches, lights, and tapers in bonded warehouses, but in other respects the section remained in force, and it was reenacted in Revised Statutes, section 3433.

By the *Act of March 24, 1874* (18 Stats., 24), imported rice, intended for exportation, was allowed to be stored and cleansed in bonded warehouses, subject to regulations to be prescribed by the Secretary of the Treasury, and the regulations for such warehouses have been the same as for those used under Revised Statutes, section 3433. (See Customs Regns. of 1884, arts. 617, 645-666; Customs Regns. of 1892, arts. 673, 693-704.)

Section 3433 was reenacted in the *Act of October 1, 1890*, section 10 (26 Stats., 614), and the scope of this section was greatly extended by section 9 of the Act of August 28, 1894 (the same act whose sixty-first section is under consideration in the present case), providing for the manufacture of goods of any kind for exportation, except distilled spirits from grain, starch, molasses, or sugar in bonded warehouses, from materials free of tax.

Although during the thirty years prior to 1894 but few classes of manufactures could be carried on in bonded manufacturing warehouses, yet the precautions adopted



to prevent fraud, and consequent loss of revenue, in the operations of such warehouses, have from the first been very complete. While considerable discretion has been left to the Secretary of the Treasury in the matter of regulations, the statutes have always imposed certain conditions upon the manufacturers, those imposed by the act now in force being as follows :

(1) The warehouses must be "similar to those known and designated in Treasury Regulations as bonded warehouses, class 6," i. e., the class known for thirty years as bonded manufacturing warehouses, detailed provisions for which (both as to their character and as to the conduct of the manufacturing that takes place within them) are found in every edition of the Customs Regulations.

(2) Satisfactory bonds must be given for the faithful observance of the law and regulations.

(3) A duly designated officer of the customs must supervise every removal of articles from the warehouse, as also all labor performed and services rendered under the provisions of the section.

(4) A sworn monthly return must be made in detail of all imported merchandise used, which return must be verified by the officer in charge.

(5) A list must be filed of all articles intended to be manufactured in the warehouse, with the formula of manufacture and the names and quantities of the ingredients.

(6) All labor performed and services rendered under the provisions of the section must be at the cost of the manufacturer.

The above provisions and the regulations prescribed by the Secretary of the Treasury are substantially the same that have been in force for thirty years, and they

furnish conclusive evidence of the desire of Congress to see to it that, as far as human care and foresight can go, the manufacturing privileges accorded by Revised Statutes, section 3433, and section 9 of the act of 1894 should not be made use of for any illegitimate purpose; yet in point of fact the risk of fraud, and consequent loss of revenue, in the case of manufactures for export is clearly much less than where alcohol is used in the manufacture of goods which are to remain in the country. The manufacture of spirits themselves in bonded manufacturing warehouses is forbidden, and the materials admitted to such warehouses free of tax can not be used in the construction and repair of the warehouses themselves, nor, of course, would it be lawful to eat or drink on the premises any edible or potable articles which had been admitted thereto free of tax, but with these exceptions it is obviously of no importance to the Government what becomes of the materials admitted to these warehouses free of tax, provided only that the products made from them be exported.

It is not necessary, in order to protect the revenue, that the products of these warehouses should be of one sort rather than another, nor that they should be used for one purpose rather than another. To take the case of alcohol, for instance, it is wholly immaterial whether the spirits used in a bonded manufacturing warehouse are afterwards recoverable from the product or not, or even whether they are used in the arts, or in medicinal or other like compounds, or for making beverages pure and simple. As long as the product is ultimately sent out of the country, there can be no fraud upon the revenue, nor

any competition with tax-paid goods or articles manufactured from tax-paid materials, whether that product be of one kind or another. In the case of alcohol used under the system contemplated by section 61, however, the actual use to which the alcohol is put is a matter of the greatest consequence, for if it is used to make a beverage, or is so recovered from the original product that it can afterwards be used as a beverage, its condition differs in no respect from that of tax-paid spirits, and its existence in that condition is a fraud both upon the Government and upon honest dealers. Hence the most effectual precautions should be taken to prevent any illegitimate use of the alcohol, but such prevention is obviously far more difficult than to prevent the domestic use of the products of bonded manufacturing warehouses. In the one case it is only necessary to make sure that nothing leaves the premises except for exportation; but in the other case the Government must know the character of each article produced by means of alcohol, and must make sure that no alcoholic product leaves the premises which can either be used as a beverage itself, or from which an alcoholic beverage can be recovered by any process with sufficient profit to offer a temptation. Far more careful and constant surveillance and scrutiny are needed, therefore, in the latter case than in the former.

Since, therefore, the use of materials, free of tax, in the manufacture of goods for export has always been under strict regulations and supervision, it follows *a fortiori* that in requiring the use of alcohol in the manufacture of goods for domestic use to be "under regulations to be prescribed by the Secretary of the Treasury,"

in order to secure a refund of the tax, Congress must have intended those regulations to be at least as stringent, and to provide for at least as thorough supervision as in the case of bonded manufacturing warehouses, the risk of fraud on the revenue as well as of injury to the interests of innocent parties being much greater where the manufactured product is not required to be exported.

No proper system of supervision can, however, be carried on free of expense, and hence, as the bonded manufacturing warehouse system exists for the benefit of the manufacturer and not of the Government, it has always been enacted from the date of the first bonded manufacturing warehouse law to the present day that—

All labor performed and services rendered under these regulations [the act of 1894, sec. 9, reads, "under these provisions,"] shall be under the supervision of an officer ["a duly designated officer," act of 1894] of the customs and at the expense of the manufacturer.

The chief item of service and labor with which the United States is concerned is of course the supervision of the warehouses, and hence the regulations for bonded manufacturing warehouses provide as follows:

11. Bonded manufacturing warehouses shall be in the custody of the collector of customs, and placed in charge of a storekeeper, whose salary will be paid monthly to the collector by the proprietor, and the same means are to be used for securing the custody and safe-keeping of the goods therein as apply to other bonded warehouses. (The Customs Regulations of 1874, art. 573; of 1884, art. 646; and of 1892, art. 694, are to the same effect.)

The means above referred to "for securing the custody and safe-keeping of the goods," as far as concerns the duties of the storekeeper, are stated in the Customs Regulations of 1892 as follows :

ART. 689. All bonded warehouses and public stores, including those occupied by appraisers, where there are such, will be placed by the collector in the custody of storekeepers, who will always keep the keys thereof in their own possession, and personally superintend the opening and closing of the doors and windows. \* \* \*

They will not permit goods to be received, delivered, sampled, packed, or repacked except in their presence or in the presence of some person designated as an assistant by the collector, nor without a written order from such collector. They will keep accurate accounts in detail of all goods received, delivered, and transferred, and of all orders for sampling, packing, and repacking. They will also make daily returns of all goods received and delivered, and also the permits for the delivery of the same, which returns \* \* \* must be certified by the proprietor or his agent as correct, and will inform the collector or warehouse superintendent of any infraction of the warehouse regulations.

The above regulations show that constant supervision by a permanently employed storekeeper is an essential feature of the bonded manufacturing warehouse system, and this being so it is but right that the cost of his services should fall upon the party benefited by the system, i. e., the manufacturer. For the purposes of the present argument, however, it is only necessary to observe that the bonded manufacturing warehouse system has always involved strict regulation and supervision, and

that the expense incurred thereby has always been provided for by law, the particular method adopted for meeting the expense being subordinate to these main facts.

THE REGULATION OF THE USE OF ALCOHOL FOR  
SCIENTIFIC PURPOSES NO CRITERION.

The system pursued in regard to alcohol withdrawn for scientific purposes, under Revised Statutes, section 3297, and the *Act of May 3, 1878* (20 Stats., 48), forms no real exception to the general practice of keeping a strict watch over all distilled spirits until the tax is paid, nor does it furnish any precedent for what should have been done under section 61. The quantity of alcohol withdrawn for scientific purposes is very small (74,697 proof gallons in 1894-95; 88,597 proof gallons in 1895-96; see Commr. of Int. Rev. Rept. 1895, p. 149; Rept. 1896, p. 149), and the applicants for such withdrawal belong to a class of persons to whom the temptation to so misuse this privilege as to defraud the Government does not appeal to any appreciable extent. Hence the Treasury Department is satisfied with requiring each such applicant to file a bond, with sufficient sureties, to secure the legitimate use of the alcohol withdrawn. Should any suspicious circumstances arise in any case, such as a sudden increase in the amount withdrawn, the Secretary of the Treasury, who is merely authorized, not required, to grant permits of withdrawal, could refuse any further permit to the suspected applicant. Obviously the regulation of the use of a few thousand gallons of alcohol in scientific research is a very different matter from the regulation of the commercial use of millions of gallons.

NO APPROPRIATION FOR THE ENFORCEMENT OF REGULATIONS EXISTED.

Seeing that the plain intent of section 61 is that the regulations had to exist before the right to rebate could arise, it is really unnecessary to inquire whether or not the Secretary was justified in declining to prescribe the regulations called for by section 61; yet, if this inquiry be for any reason held desirable, it will demonstrate that the Secretary could not possibly have taken any other course. To properly enforce the regulations which he submitted to Congress—regulations which seem to be thoroughly reasonable and which Congress never disapproved—would have certainly cost much more than the estimated \$500,000, but neither this sum nor any part of it was at the Secretary's disposition. The repayment of an internal-revenue tax being obviously a matter to be dealt with by the Bureau of Internal Revenue, the expense of enforcing the necessary regulations, if provided for at all, would certainly have to come out of some appropriation for that bureau, but no appropriation applicable to the enforcement of section 61 was made. The cost of the Internal-Revenue Service is met by appropriations made specially each year and limited in their application. For the fiscal year 1894-95 these appropriations were as follows:

(1) Office of the Commissioner of Internal Revenue:	
Salaries .....	\$261,590
Stamp agent and counter .....	2,500
(2) Collecting internal revenue:	
Salaries and expenses of collectors, deputy collectors, etc., including expenses incident to certain specified statutes .....	1,710,000

## (2) Collecting internal revenue—Continued:

Salaries and expenses of agents, storekeepers, etc., and for miscellaneous expenses.....	\$1,900,000
(3) Punishment for violations of internal-revenue laws.	50,000

The above three classes of appropriations, made by the acts of July 31 and August 18, 1894 (28 Stats., 177, 180-181, 388), constituted the only funds available for matters relating to internal revenue when the act of August 28, 1894, was passed. In so far as section 61 involved work to be done by the Commissioner himself or his subordinates in his office, the performance of such work was made possible by the first appropriation above mentioned, and accordingly all the necessary work of that character was done. Section 61 called for "regulations to be prescribed by the Secretary of the Treasury," and the duty of preparing such regulations necessarily devolved upon the Commissioner and his subordinates. In the early part of September, 1894, the Secretary requested that such regulations should be drawn up, and it was done accordingly. Had it been possible to enforce these or any similar regulations, other work would have been required of the Commissioner's office—viz, drafting of forms, keeping of accounts, etc.—and this also would have been made possible, at least theoretically, by the appropriation for that office. To enforce the regulations, however—i. e., to supervise the use of alcohol under section 61—there was no appropriation, since such supervision could not be performed by the personnel of the Commissioner's office, nor did it concern in any way the collection of internal revenue nor the "detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws." Had the system been



put in operation, the persons employed for this latter purpose would probably have had to visit from time to time places where alcohol was used in the arts, but such detective service would have been something very different from the supervision necessitated by section 61.

The diversion of any of the three classes of appropriations above mentioned to such an object as the enforcement of regulations under section 61 would clearly have come within the prohibition of Revised Statutes, section 3678, the objects for which such appropriations were respectively made being sufficiently defined in the appropriation acts, and manifestly not including any object of the nature of such supervision.\* The agents, gaugers, and storekeepers provided for are all persons engaged in "collecting internal revenue" (28 Stats., 180), and the miscellaneous expenses are similarly restricted. Besides, section 3642, Revised Statutes, forbids any expenditure for official compensation out of appropriations for miscellaneous purposes.

While it is true that a portion of the appropriation for "collecting internal revenue" is applicable to certain other objects, all such objects are particularly specified and are evidently classed with the collection of internal

\* In view of the above, it is superfluous to allude to the manifest inadequacy of the appropriations for the Internal-Revenue Service for 1894-95 if they were to be applied to any other object than concerned the collection of the revenue. In point of fact they were smaller than for the previous fiscal year, and as there was no change in the revenue laws to decrease the work of the Bureau (except as to the sugar bounty, and that not till after the appropriations were made), the reduction only indicates an intention to enforce greater economy.

revenue merely as a matter of convenience. These objects are the taxation of oleomargarine, the inspection of tobacco exported, and necessary expenses in regard to the sugar bounty, and their special mention excludes the idea that this appropriation could be applied to any other objects not coming strictly under the head of "collecting internal revenue." The special mention of the oleomargarine act (August 2, 1886; 24 Stats., 209) is particularly significant, because, as that act taxed the manufacture and sale of oleomargarine, the expenses involved thereby might perhaps be regarded as expenses for collecting revenue, the regulation of the manufacture, sale, importation, and exportation being merely incidental to the taxation. Congress did not take this view, however, but considered that, the regulation being the main purpose of the act, its expenses could not, without special authority, be charged to the usual appropriation for collecting revenue, although a tax was imposed.

It is contended in the appellant's brief (pp. 76-91) that the appropriation for "collecting internal revenue" was not, in point of fact, strictly limited in its use, and that in several instances expenses not incident to the collection of internal revenue were paid out of the appropriation for such collection; but an examination of the instances cited will show that the conclusions which were sought to be drawn from them are utterly unwarranted.

*Duties of collectors in regard to drawbacks.*

Section 3161, Revised Statutes, imposes upon internal-revenue collectors certain duties in regard to drawbacks, but these occasional duties are merely added to their

primary duties of collecting internal revenue, for which they are paid under the appropriation for that purpose. The Internal Revenue Report for 1896 (p. 198) shows that in the past twenty years the whole number of drawback claims has never exceeded 1,744 in any one year, that it has usually been much below that figure, and that in 1895-96 it was 227. It is clear that the performance of official duty in connection with such claims is only occasionally required, so that all that is needed is to detail officers to attend to such matters as each case comes up. As a matter of convenience this duty is imposed upon collectors, but the regular pay of such officers, who are paid from the appropriation for collecting internal revenue, is not affected by the peculiar nature of such occasional duties.

The only possible instance where the Internal Revenue Bureau may perhaps keep a man exclusively employed about drawback matters is in the case of the clerk who attends to those claims in the Commissioner's office, but the appropriation for that office is not limited to the work of collecting internal revenue.

*Withdrawal of spirits for use in bonded manufacturing  
warehouses.*

As to the duties of internal-revenue officers in connection with the withdrawal of spirits from bond for use in bonded manufacturing warehouses, under sections 3330 and 3444, this also is a very trifling matter, there being very few such warehouses. As a matter of principle, however, these duties may rightly be included under the head of collecting internal revenue, because

until the spirits are actually used in manufacturing they are taxable, so that until they actually reach the manufacturing warehouse they are under the control of the internal-revenue officers for precisely the same purpose as are all spirits in bond—i. e., for the purpose of insuring the collection of revenue. Under section 61, on the other hand, the object of the control of the spirits would have been to prevent fraudulent claims for rebate, and not the collection of a dollar of revenue.

*Investigation of tax-refund claims.*

The use of "local officers in the field," in the investigation of applications for a refund of taxes under sections 3220 and 3221, was cited as an instance of the failure to restrict the expenditure of the appropriations for collecting internal revenue to matters necessarily connected therewith. All applications under section 3220, however, are necessarily based exclusively upon the acts of the revenue officers in the collection of internal revenue, so that the only matter to be investigated is whether or not those officers have done their duty in the collection of revenue. Whatever official work is done under this section concerns "the collection of revenue" in the strictest sense of those words, even though in some cases the result of such work may be the ultimate refunding of money which was not properly revenue, but was wrongly collected as such.

Section 3221 concerns applications for the abatement or refund of taxes due or paid on spirits destroyed while in Government custody. Such custody is for the purpose of the ultimate collection of internal revenue, and

the investigation of applications under this section is the investigation of circumstances arising during that custody and for the purpose of determining whether revenue should or should not be collected, or should or should not have been collected, upon the spirits destroyed. Such an investigation concerns the collection of revenue.

The question which would have arisen under section 61, had it ever gone into practical operation, would not have concerned the propriety of the collection of the tax upon alcohol at all, as no alcohol was intended to be used under this section except such as had been properly taxed; but the only question would have been whether the *use* of the alcohol had been such as to call for a refund of the tax, a question which had nothing to do with the collection of revenue whatever, but merely with the retention or repayment of properly collected revenue.

*Inspection of vinegar factories.*

The fact that the inspection of vinegar factories (where the alcohol incidentally produced is allowed to be used free of tax) is performed by revenue agents and deputy collectors, who are paid out of the appropriation for collecting internal revenue, does not constitute a diversion of that appropriation to purposes other than such collection. Section 3282, Revised Statutes, makes all the provisions of sections 3276, 3277, and 3278 (authorizing revenue officers to enter and examine distilleries) "applicable to all premises whereon vinegar is manufactured, to all manufacturers of vinegar, and their workmen or other persons employed by them." This means that in

order to insure the collection of the revenue from distilled spirits vinegar factories were put on the same footing as distilleries, subject to the same inspection. The mere fact that the spirits produced at vinegar factories are not to be taxed, but to be used up in the manufacture of vinegar, does not make the inspection of such factories different in its character or object from the inspection of distilleries, because, until so used up, the spirits produced at vinegar factories are capable of being used for the same purposes as those produced at distilleries, and hence in both cases the inspection is properly performed by the same class of men, paid out of the same appropriation.

*Withdrawal of alcohol in manufacture of sorghum sugar.*

The position taken by the Bureau of Internal Revenue as to the withdrawal of alcohol, free of tax, for use in the manufacture of sorghum sugar, under the *Act of March 3, 1891* (26 Stats., 1050), is also in perfect harmony with what has been stated above as to the limited application of the internal-revenue appropriations. That act authorized distilled spirits of a certain strength to be withdrawn from distillery warehouses, free of tax, and used in the manufacture of sorghum sugar "under such bonds, rules, and regulations for the protection of the revenue \* \* \* as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe." The regulations prescribed (Series 7, No. 7, Revised.—Supplement No. 1, 1891) were very full, and have evidently served as the model for the regulations proposed under section 61. They

provided for complete supervision of the use of such alcohol and the assignment of a deputy collector and gauger to each factory, but this called for no additional appropriation, not only because if such alcohol had ever been withdrawn from warehouse for the purpose stated it would have remained taxable, and subject to supervision until actually used up, but also because the factories were already under the charge of the Bureau of Internal Revenue by authority of the act of October 1, 1890, Schedule E (26 Stats., 583), providing for the allowance of a bounty on sugar "under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe." The internal-revenue appropriations for each fiscal year from 1891-92 to 1894-95, inclusive, had all provided for meeting "expenses incident to enforcing the provisions of the act of October 1, 1890, providing for the payment of a bounty on sugar" (26 Stats., 925; 27 Stats., 200, 692; 28 Stats., 180), and to require the men already on duty at sorghum-sugar factories, or other men whom the Commissioner had authority to employ there, to supervise the use of alcohol, would have involved no expense not provided for by such appropriations.

The "rules and regulations" authorized by the sugar-bounty law might require any degree of strictness of supervision which the Commissioner saw fit to enforce, and if the precise work done in factories of a certain class called for more supervision than that done in those of another class, the Commissioner had it in his power to keep a man permanently employed at one place, while other places where

a different class of work was done were merely visited from time to time. Hence, when the Commissioner proposed to employ a deputy collector and gauger at each sorghum-sugar factory using alcohol free of tax he merely proposed to exercise that special supervision which the law entitled him to exercise at all sugar factories, and for the expense of which there was an appropriation.

In point of fact, however, there were in 1891 but six producers of sugar from sorghum in the United States (Rept. of Com. of Int. Rev. 1891, p. 200), and no alcohol was ever withdrawn free of tax under the act of March 3, 1891. (See Report of Commissioner of Internal Revenue, 1891, pp. 180, 200; report of 1892, p. 175, the later reports making no mention of it whatever.) No expense was therefore ever incurred on account of supervision under this act.

*Withdrawal of alcohol for scientific purposes.*

The withdrawal of alcohol free of tax for scientific purposes, under section 3297, Revised Statutes, and the *Act of May 3, 1878* (20 Stats., 48), which has been already referred to above, involves merely the approval of applications and bonds, the granting of permits, the making of certain entries in storekeepers' and gaugers' reports and collectors' accounts, and the transmission of a few papers. (See the published regulations.) These acts are all merely a part of the routine business of the office of the Commissioner of Internal Revenue and of the storekeepers, gaugers, and collectors, and are in no way distinguished from their other official acts, so that no separate appropriation is required. On account of the small



amount of alcohol withdrawn for scientific purposes and the high character of the class of persons so using alcohol, no supervision of their use of it has ever been thought necessary; but should it ever be found so, it could be provided for from the appropriation for collecting internal revenue, because, until used up, this alcohol also maintains its taxable character and is properly the subject of supervision.

*Use of grape brandy in fortification.*

Similarly, grape brandy used free of tax, in the fortification of pure sweet wine, under the *Act of October 1, 1890*, sections 42-46 (26 Stats., 621-623), is taxable until actually so used, and is properly the subject of supervision by the Bureau of Internal Revenue. Where the wine producer is also a distiller his premises are subject to supervision as a distillery, whether he fortifies his wine or not, but even in the case of other persons, the cost of supervising the use of grape brandy for fortification is, for the reason above stated, properly chargeable to the appropriation for "collecting internal revenue."

While it is true that the result is the same, to the user of spirits, whether he obtains them free of tax or obtains a rebate after their use, so that from this point of view section 61 may be called a law for "free alcohol," yet there is absolutely no analogy between the supervision of the use of spirits which are freed from taxation when used for a particular purpose and that of the use of tax-paid spirits upon which a rebate of the tax is afterwards to be claimed. In the former case the spirits are subject to taxation until they are actually used, while in the latter

case, the tax upon the spirits having been paid, they can not again become subject to taxation, and hence the supervision of their use can have nothing to do with the collection of internal revenue. Such supervision may be absolutely necessary in order to prevent the presentation and payment of fraudulent claims for rebate, but neither the payment of just claims nor the prevention of fraudulent ones can be regarded as the collection of revenue, and the cost of such supervision can not lawfully be paid for out of an appropriation for the cost of collecting internal revenue.

*The filled-cheese law.*

The "filled-cheese" law of June 6, 1896 (29 Stats., 253), bears some analogy to the oleomargarine law of 1886, in that it regulates a business as well as imposes a tax. Congress has evidently considered, however, that, unlike the oleomargarine law, the taxation is the main feature and the regulation merely incidental thereto, so that the expense involved thereby may properly be charged to the appropriations for the Commissioner's office and the collection of internal revenue.

PRACTICE UNDER CUSTOMS APPROPRIATION NO  
PRECEDENT.

Appellant's counsel point out (Brief, pp. 87-89) that the permanent annual appropriation "for the expenses of collecting the revenue from customs" (R. S., § 3687) is in practice applied to other purposes than that of the mere collection of revenue, and from this they contend that

there is no reason for a stricter rule as to the appropriations for "collecting internal revenue." The expenses of collecting the customs revenue were originally retained by the collectors out of the fees of their respective offices, and the permanent appropriation system dates from the act of March 3, 1849 (9 Stats., 398). Under the fee system all the expenses of the service, whether in connection with duties or drawbacks, were provided for, and from the first all official acts in connection with drawbacks have been performed by customs officers. In view of this prevailing system, it was natural that an appropriation "for the expenses of collecting the revenue from customs" should be understood as intended by Congress to cover all expenses in connection with services performed by customs officers, especially as in 1849 the policy of restricting the use of appropriations to the precise purpose named was not at all as strictly enforced as now, the systematizing of the business of the Treasury Department having been a matter of development.

While the permanent appropriation "for the expenses of collecting the revenue from customs" has for fifty years been understood as applicable to the expenses of the customs in a rather broad sense, no such view has ever been taken of the annual appropriations for "collecting internal revenue," which, as already shown, have always been applied exclusively to matters more or less strictly relating to such collection. Even if this had been otherwise, and the appropriation for "collecting internal revenue" had been intended by Congress and understood by the Secretary of the Treasury as covering all expenses incurred in the internal-revenue service outside of the

Commissioner's office, the Secretary would still have been justified in postponing action under section 61 until Congress had enabled him to employ the requisite force. The appropriation act of 1894 (28 Stats., 180-181) forbade him to employ more deputy collectors or clerks, and while he might, theoretically, have employed additional men of the storekeeper and gauger class, yet to have done so to the extent required for proper supervision of the industrial use of alcohol all over the country would have most seriously impaired the appropriation applicable to the work of supervising the distillation of spirits, and thus have prevented the proper collection of the revenue unless Congress came to his relief. Whether the employment of men to enforce regulations under section 61 would have been illegal or merely impracticable, the consequence is the same, that the Secretary was justified in not employing them, and can not be charged with any attempt to override the will of Congress.

COLLECTORS NOT CHARGED WITH ENFORCEMENT OF  
REGULATIONS.

Appellant's counsel (Brief, p. 90) point out that section 61 imposed certain duties upon collectors of internal revenue, and that such duties could properly have been performed by them and their deputies without additional compensation, although their salaries were paid out of the appropriation for collecting internal revenue. This is all undoubtedly true, because the mere fact that an officer's salary is required by statute to be paid out of a particular appropriation can not affect the power of Congress to impose new duties upon him, no matter how dif-

ferent such duties may be from those for which he is primarily employed and paid. It is equally true, however, that under section 61 the collectors were not to enforce the regulations or in any way to supervise the manufacturing operations, but only to satisfy themselves that the regulations had been complied with and the alcohol used thereunder, which practically would have meant their receiving and passing upon the reports of the officers specially appointed to supervise the manufacturing and enforce the regulations. The trouble with section 61 was not that there was no appropriation to pay for making regulations or for receiving proof that they had been complied with, but that there was none for enforcing them.

COST COULD NOT HAVE BEEN LAID ON THE MANUFACTURES.

The use of any money not appropriated for the purpose would have been wholly illegal under Revised Statutes, section 3678, and to have required the applicants for rebate to pay the expense would have been equally illegal, in spite of the manifest justice of such a course. This course should probably be held to come within the prohibition of the *Act of May 1, 1884* (23 Stats., 17), reading as follows:

Hereafter no Department or officer of the United States shall accept voluntary service for the Government, or employ personal service in excess of that authorized by law, except in cases of sudden emergency, involving the loss of human life or the destruction of property.

In point of fact, however, the above statute is not needed to make it clear that the cost of enforcing regulations as to the use of alcohol can not be put upon the

applicants for rebate without express authority of law, because such a system would amount to reducing the rebate, which, having been fixed by Congress at the whole amount of the tax paid, as shown by the stamps, can not be reduced by executive action. In the case of *Ames v. Hager*, cited in Treasury Department Decisions, No. 9129, in the United States circuit court in California, it was held that a manufacturer who made entry for drawback under Revised Statutes, section 3019, could not be required to pay for the services and expenses of a customs inspector in counting, inspecting, and identifying the manufactured articles, although such counting, inspection, and identification were required by the customs regulations as essential to the ascertainment of the amount of drawback to be paid. This decision has never appeared in the reports, but it is so manifestly correct that it was at once submitted to by the Treasury Department, which changed its practice so as to conform thereto.

By an extraordinary stretching of the doctrine of implied statutory powers, appellant's counsel contend that "as the act implies all powers necessary for its execution," the Secretary of the Treasury must have had the power to enforce all necessary regulations, "even if no appropriation existed." The only hint, however, as to the mode in which the Secretary's power might be exercised is found in the extraordinary suggestion that "he could have provided by regulations for the payment of the expenses by those claiming the benefits of the act." (Appt.'s brief, p. 76.) This suggestion is doubly extraordinary as coming from appellant's counsel, who, in the

same brief (pp. 56-63) insist so strongly that the Secretary's failure to carry out section 61 was an unconstitutional assumption of power, by an executive officer, "to tax an article which Congress has said shall be free of tax."

That the Secretary of the Treasury has no power to impose taxes is undeniable, and while one may well question whether his inaction in regard to section 61 involved an assumption of that power, it is manifest that an assessment on the applicants for rebate, to provide a fund for carrying on the rebate system, would have been taxation pure and simple. Moreover, this is precisely what the United States circuit court in California, in the analogous case of a drawback, held could not be done. (*Amex v. Hager*, Treasury Decisions, No. 9129, cited *supra*.)

Under these circumstances it is hardly necessary to point out that the cases upon which this contention rests bear no analogy to the present case. An authority to municipal corporations to borrow money implies the power to levy taxes for the payment of the loans, because that is "the ordinary means employed by such bodies to raise funds" (*United States v. New Orleans*, 98 U. S., 381, 393), but the "ordinary means" by which the Secretary of the Treasury pays the persons employed in his Department is by an appropriation made by Congress for the purpose, and not by an assessment levied upon outside parties who have business with his Department. It is usual to delegate to municipal corporations the power to impose taxes, and to authorize municipal officers to grant permits to lay electric wires under ground,

as in *Rolls Co. Court v. United States* (105 U. S., 733), *U. S. Electric Lighting Co. v. Commissioners* (24 Wash. Law Rep., 777), and the other cases cited by appellant's counsel, but it is most unusual, in modern constitutional governments, to delegate to executive officers the power to lay any taxes or assessments whatever.

It should be remembered that when we speak of something as implied from the language of a statute we mean that the legislature actually intended that thing, but considered that under the circumstances it was needless to set it out in specific language, because there was really no room for doubt. If there be any serious doubt as to the intention of the legislature, the implication can not be permitted, and, to take the present case, that Congress must have intended to empower the Secretary of the Treasury to raise money, independently of appropriations, to pay for work done by his Department, is about the last thing that can be asserted with confidence.

Even in the case of municipal corporations the power to levy taxes is not implied when "there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference." (*Loan Association v. Topka*, 20 Wall., 655, 660.) In the present case the prohibition of the employment of personal service in excess of that authorized by law (*Act of May 1, 1884*, 23 Stats., 17) and of the drawing of money from the Treasury without an appropriation (Const., Art. I, sec. 9; Rev. Stats., sec. 3675) show that without express authority of law no use could have been made of the money obtained from the applicants for



rebate after it had been paid into the Treasury, and hence that no power to receive such money could have been implied.

It may be extraordinary that Congress should have intended that section 61 should not, or contemplated that it might not, be carried out without further legislation (though an examination of the peculiar circumstances under which the section was enacted shows that such an intention or contemplation was quite reasonable), but it would have been much more extraordinary if Congress had intended by this section to imply a right, on the part of an executive officer, to levy upon applicants for rebate such assessments as he might see fit, and in other respects to act in a manner forbidden by statute, and practically by the Constitution itself.

Since, then, the adoption of effective regulations for the use of alcohol under section 61 was necessary for the protection of the revenue and of the interests of honest dealers in spirits, and was intended by Congress, and no regulations could be effective without the expenditure of a large sum of money, which money Congress did not provide either by appropriation or by authorizing the cost to be laid upon the applicants for rebate, the Secretary of the Treasury clearly could do nothing more than report to Congress at the earliest date his inability to carry this section into execution, stating plainly the cause of such inability. This he did, and, as already stated, both the action and inaction of Congress manifested its approval of his course.

THE POLICY OF FREE ALCOHOL IN THE ARTS HAS  
NEVER APPEALED STRONGLY TO CONGRESS.

The appellant's brief (pp. 4-17) contains an elaborate argument in regard to the general policy of relieving alcohol, when used in the arts, etc., from all taxation, and also in regard to this policy as carried out by foreign countries. The conclusion attempted to be deduced is that as these considerations have frequently been brought before Congress, and measures to carry out this policy repeatedly introduced, therefore section 61 must necessarily be construed as expressing the intention of Congress to adopt what appellant's counsel call "a new policy of taxation"—to grant a rebate of the tax in any event, so long as the alcohol was used in the arts, etc., whether such use was under regulations or not. In point of fact, however, the logical conclusion to be drawn from the appellant's argument is precisely the reverse of this. It is evident that, in spite of the many and strong arguments in favor of the policy of free alcohol in the arts, it was only with great difficulty and after repeated efforts that Congress was induced to pass any measure whatever in the line of that policy. This being so, one would naturally expect the first measure of this character to be a very cautious one, providing only for such freedom (whether direct or indirect) from taxation as could in no way endanger the revenue to be derived from alcohol when used as a beverage; or, in other words, since experience points to official regulation as the best means of attaining this end, one would naturally expect to find official regulation made a condition inseparable from any

grant of relief from taxation of alcohol when used in arts, etc.; and if the language of the statute admitted of any doubt on this point, it would be much more reasonable to construe such language as requiring official regulation as an essential condition of the relief granted, rather than as granting any relief from the tax in the case of alcohol not used under regulations. To contend that Congress, after having repeatedly been applied to in vain by the industrial users of alcohol, suddenly became convinced that a remission of the tax was so essential to the public welfare that it should be made in any event, even if there was no official regulation of the use of the alcohol, is to disregard utterly the natural course of human action, especially in regard to legislation, where gradual development is the rule, rather than violent and sudden change.

The appellant's contention as to the sudden desire of Congress that alcohol, when used in the arts, should at all hazards be free from taxation, is seen to be peculiarly inapt when it is reflected that although one object of the act of August 28, 1894, was to dispense with all unnecessary taxation, the House of Representatives, vested under the Constitution with the right of initiative in bills to raise revenue, voted to increase the spirits tax from 90 cents to \$1.10 per proof gallon without making any exception in the case of alcohol used in the arts, and that section 61 was only inserted by the Senate along with a number of other amendments which the House was compelled to accept in order to avoid losing the whole bill. Assuredly a liberal construction of section 61 is not justified by any evidence of an overwhelming

desire on the part of Congress to do anything for the users of alcohol in the arts.

The contention (appellant's brief, p. 14) that the freeing of alcohol from taxation when used in the arts was "a logical element of the act of 1894," when considered in the light of what the House of Representatives really undertook to do in that act, only shows that the logic of appellant's counsel is not that of the House. The contention is, moreover, greatly weakened by the extravagance of the arguments in its support. Appellant's counsel say that the provisions of the act of 1894 in regard to free raw materials, reduction of customs duties on manufactured articles, and the increase of the spirits tax "made the policy of free alcohol in the arts \* \* \* *an industrial necessity*," that without free alcohol "the results would have been of the most detrimental character to American manufacturers," and that "no American Congress could have contemplated so iniquitous a result of legislation." Now, in point of fact, during the whole period of nearly three years that the act of 1894 was in force, manufacturers received no benefit from section 61, and this section was repealed in June, 1896, while the spirits tax has not yet been reduced below the rate adopted in 1894. As far as legislation is concerned, therefore, the actual conditions have been precisely those which appellant's counsel have denounced as necessarily involving results "of the most detrimental character to American manufactures," yet it does not appear that any wide-spread injury resulted, or even that the failure to carry out section 61 produced any

detrimental effect whatever upon manufacturing interests, or any discrimination which has been seriously felt by American farmers or distillers. Moreover, although the drawback allowed on foreign alcohol contained in manufactured goods when exported (see appellant's brief, p. 16) may discriminate against the use of American alcohol in certain lines of manufacture, it can not do so in the appellant's business. The alcohol which he uses is wholly evaporated in the process of the manufacture (Rec., p. 4), so that nothing remains on which to claim a drawback. The contention that section 61 should receive the construction for which the appellant contends, in order to avoid a discrimination against American farmers and distillers, has therefore no force whatever in the present case.

THE CASES IN THE LINE OF CAMPBELL *v.* UNITED STATES ARE NOT IN POINT.

The radical difference between the language of section 61 and that of the drawback laws has already been pointed out. In spite of this manifest difference, the chief contention in the court below in behalf of the claim was that the present case came within the rule laid down in *Campbell v. United States* (107 U. S., 407), viz: That where a statute declares that there shall be a rebate or drawback of a tax under certain circumstances, the amount to be determined under regulations to be prescribed by the Secretary of the Treasury, the inaction of the Secretary is immaterial, and the drawback must be paid whether the amount has been ascertained under the Secretary's regulations or not, because the statute, and not

the Secretary's regulations, grants the drawback. That this is still the chief contention is shown by the prominence given to the opinion in the *Campbell* Case in the appellant's brief (pp. 19-26). The full and sufficient answer to this contention, as the court below has pointed out, is that the language of the drawback law is very different from that of section 61, and that consequently the circumstances of the present case are not the same as those of the *Campbell* Case, the differences being those between the conditions upon the fulfillment of which the right to drawback exists and those precedent to the existence of a right to rebate under section 61. Under the drawback law the conditions precedent are (1) use of imported materials in manufacture, (2) ascertainment of amount of drawback, such ascertainment to be made in accordance with the regulations, and (3) exportation. In the *Campbell* Case the first and third conditions existed without question, and it was held that the second also had been fulfilled, because the amount due had been proved to the satisfaction of the court as completely as if every reasonable regulation had been complied with, and it was not the claimant's fault that official action under the regulations had been suspended. Had that suspension prevented exportation or even the ascertainment of the amount due on exportation, a different case would have been presented, and hence the doctrine of the *Campbell* Case can only apply where the results intended to be attained by official action are as fully attained by other means. Under section 61 the conditions precedent are, (1) use of alcohol by manufacturers under regulations, (2) proof of compliance with

regulations, (3) proof of use of alcohol, and (4) delivery of stamps for taxes paid on the alcohol used. Had the first condition existed in the present case and had the collector refused to receive the proof, the case would bear more resemblance to *Campbell v. United States*, because the proof might be made to the court as completely as to the collector, but the trouble is that the first condition never existed and that nothing can take its place. As this court said in *United States v. McLean* (95 U. S. 750), already cited:

Courts can not perform executive duties, or treat them as performed, when they have been neglected. They can not enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform.

*A fortiori* courts can not enforce rights which are dependent for their existence upon the prior performance of certain acts in concurrence with or in subordination to certain official acts which have never been performed.

The difference between the present case and that involved in *Campbell v. United States* may be stated thus: that where Congress attaches certain consequences to the doing of a thing and merely requires the proof to be made in accordance with official regulations, then if those regulations are not made or are suspended, but the proof is made to the satisfaction of a court or jury as completely as if any reasonable regulations had been complied with, the nonexistence or suspension of the regulations is immaterial; but if Congress requires the thing itself to be done (as distinguished from the mere presentation of proof of the doing of it) under official regulations, then

the absence of regulations is material, and the same consequences will not attach as if the regulations had existed and had been complied with.

The sugar-bounty law, passed upon by the Court of Claims in *Glynn v. United States* (32 C. Cls. R., 82), was somewhat analogous to the drawback law, and hence that case also is easily distinguishable from the present. The language of the law, so far as it was involved in that case, was this :

That on and after July first, eighteen hundred and ninety-one, and until July first, nineteen hundred and five, there shall be paid, from any money in the Treasury not otherwise appropriated, under the provisions of section three thousand six hundred and eighty-nine of the Revised Statutes, to the producer of sugar testing not less than ninety degrees by the polariscope, from beets, sorghum, or sugar cane grown within the United States, or from maple sap produced within the United States, a bounty of two cents per pound ; and upon such sugar testing less than ninety degrees by the polariscope, and not less than eighty degrees, a bounty of one and three-fourths cents per pound, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. (26 Stats., 583.)

The same statute provided for regulations of the manufacture and production of sugar, restricted the bounty to persons licensed by the Commissioner of Internal Revenue, and required an application for license to be made, stating certain facts, and accompanied by a bond, with sureties, to secure compliance with the rules and regulations. The license had been given, and all the regulations in regard to manufacture had been complied with,



but most of the sugar had been burned up before it was officially weighed and tested.

The Court of Claims held that the right to a bounty "springs directly from the provisions of the law in the form of an express obligation to pay a certain compensation for certain productions," and that when such productions had been manufactured, in compliance with regulations and under a proper license, the right to a bounty was complete. All that the Commissioner of Internal Revenue had then to do was to ascertain the amount of the bounty.

The words "under such rules and regulations as the Commissioner of Internal Revenue \* \* \* shall prescribe" manifestly related primarily to the payment of the bounty—i. e., practically to the ascertainment of the amount of bounty to be paid. This is shown by the structure of the single sentence composing the section, which may be summarized thus :

That \* \* \* there shall be paid \* \* \*  
to the producer of sugar \* \* \* a bounty of  
two cents a pound \* \* \* under such rules and  
regulations as the Commissioner of Internal Revenue  
\* \* \* shall prescribe.

What rules and regulations should be necessary was left to the Commissioner and Secretary to determine, and an appropriation was made for the expense involved. Such rules and regulations could, however, only relate to the proof of the quantity and grade of the sugar produced, and hence if they were relaxed as to any matter, or if their complete enforcement was accidentally pre-

vented, the court held that the right to bounty was not affected thereby. As long as the applicant for bounty had received a license to manufacture, whatever bounty he could prove himself to be entitled to was his, even though the Secretary of the Treasury might consider that the proof was not altogether such as the rules and regulations required. Other sections of the law required the manufacturing itself to be done under regulations, as well as under a license, and had those regulations not been complied with a different question would have been presented; but as it was the provisions of the law were such as to clearly distinguish the *Glynn* Case from the present one.

In *Morrill v. Jones* (106 U. S., 466; see appt.'s brief, pp. 27, 52) the statute had merely empowered the Secretary of the Treasury to regulate the method of proving that animals were specially imported for breeding purposes, so that they should be admitted free of duty. There was no question but that the animals in that case had been specially imported for such purposes, nor as to compliance with suitable regulations, but merely whether he could require the animals to be of superior stock when the statute had not so required. Had the Secretary, under section 61, prescribed regulations which were claimed to change the application of the statute, *Morrill v. Jones* would have had some bearing, but in the present case it can have none.

The cases of *Railroad Co. v. Smith* (9 Wall., 95) and in *French v. Fyan* (91 U. S., 169) are also cited by appellant's counsel. In both cases the act before the court was

that of September 28, 1850 (9 Stats., 519), reading as follows:

To enable the [States containing swamp lands] to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said [States].

Sec. 2. \* \* \* It shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State, \* \* \* and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent the fee simple to said lands shall vest in the said State.

The grant made by the first section of this statute was in terms absolute and unconditional, and it was not unreasonably held in *Railroad Co. v. Smith*, though with the dissent of Clifford, J., that the failure of the Secretary of the Interior to make a list and plats, and to perform the other duties imposed upon him in regard to the land by the second section, did not affect the completeness of the grant, and that evidence was admissible to show that any particular land was within the grant. In *French v. Fyan* this court affirmed the doctrine that the grant in the swamp-land act was one *in presenti*, while holding that after the patent had issued no evidence as to the character of the land was admissible. Had the swamp-land act merely provided that lands ascertained by the Secretary of the Interior, or in accordance with

his regulations, to be swamp lands, should be granted to the States, there would have been some similarity between that act and section 61; but as it is the two are wholly dissimilar, and these cases have no bearing on the present issue.

In *United States v. American Tobacco Co.* (166 U. S., 468; see appellant's brief, p. 28), the statute under consideration required the redemption of tobacco stamps when destroyed or spoiled in all cases where the fact of such loss or destruction was satisfactorily proved, and the question was whether the Commissioner of Internal Revenue, under his general power to make regulations (for the statute conferred no power of regulation whatever), could in any case avoid redeeming the stamps if the fact of destruction or spoiling were proved. It was held that he could not; but that decision has absolutely no bearing upon the present case. Had section 61 provided for a rebate in all cases where the use of alcohol in the arts was satisfactorily proved, and the Secretary of the Treasury had refused to receive proof, then the *American Tobacco Co.* Case might have had some bearing, but as the only rebate promised was for a use under regulations—a regulated use—a wholly different question is presented.

The cases concerning regulations in regard to importation free of duty (*Balfour v. Sullivan*, 19 Fed., 578; *Pascal v. Sullivan*, 21 id., 496; *Siegfried v. Phelps*, 40 id., 660; *United States v. Mercadante*, 72 id., 46; *Bartram v. United States*, 77 id., 604; *United States v. Dominici*, 78 id., 334), cited in the appellant's brief, have no bearing on the present case. The laws in regard

to the free list do not require that the goods, while on their way from the point of shipment, shall be under supervision, or in any way subject to the regulation of the Treasury Department, but merely that on their arrival the fact that they are entitled to free entry shall be ascertained under regulations prescribed by the Secretary. Such a fact could of course be ascertained without any regulations at all, and it was properly held that regulations directed to that end can not be binding upon the courts. Appellant's brief (p. 31) asserts that *Bartram v. United States*, involved "a question identical in principle with that presented by the present case," yet the statute in the Bartram case, quoted on the very next page of the brief, merely requires "proof of the identity" of the articles imported to be made under regulation. In the present case the furnishing of proof by the claimant was but a small part of what the statute required, the actual use of the alcohol under regulations in the various manufacturing operations being the main thing required, and no analogous requirement is found in the Bartram case or others of its class, any more than in the Campbell case.

The cases of *United States v. Mann* (2 Brock., 1), *United States v. Bedgood* (49 Fed., 54), and *Anchor v. Howe* (50 id., 367), cited in the appellant's brief (pp. 34, 35), merely held that executive regulations must be reasonable, but this incontrovertible doctrine can not affect the question of whether a rebate granted for doing something under regulations can be claimed where the thing has not been done under regulations.

NO ANALOGY WITH PROVISIONS OF OTHER SECTIONS  
REQUIRING REGULATIONS.

The appellant's brief (p. 39) calls attention to the fact that thirty-nine other provisions of this same act of August 28, 1894, call for regulations by the Secretary of the Treasury, and in view of this fact it is contended that as there has been no difficulty in prescribing and enforcing adequate regulations in any of those cases, there can be no valid reason why the regulations called for by section 61 should not have been prescribed and enforced. The contention is ingenious, but overlooks the fact that the subject-matter of section 61 is distinctly different from that of any of the other sections or paragraphs which authorize regulations, as may be seen by a reference to them, which will be aided by a classification.

Class I. Provisions relating to the collection of customs duties and the free list:

- Sugar, par. 182 $\frac{1}{2}$ , 2 Supp. R. S., p. 279.
- Tobacco, par. 185, p. 280.
- Wines, etc., par. 244, pp. 284-285.
- Animals for breeding, par. 373, p. 297.
- Cattle, etc., par. 373, p. 297.
- Animals for exhibition, par. 374, p. 297.
- Emigrants' teams, par. 374, p. 297.
- Casks, etc., par. 387, p. 297.
- Books, etc., for schools, etc., par. 413, p. 299.
- Indian goods, par. 582, p. 303.
- Theatrical scenery, par. 596, p. 304.
- Works of art, etc., by Americans, par. 686, p. 307.
- Works, of art, etc., of professionals, par. 687, p. 307.
- Works of art, etc., for exhibition, par. 688, p. 307.
- Cigars, sec. 26, p. 314.

All the above provisions relate either to the ascertainment of the duty which is to be paid upon imported articles, or the ascertainment of whether an article is free or dutiable, or, in the case of section 26, the method of collecting the duty. All such matters necessarily come under the general head of the collection of revenue from customs, the expense of which is provided for by a permanent appropriation. These provisions involved nothing new, and there was ample power to enforce such regulations as were called for.

Class II. Provisions relating to importation or manufacture in bond, or withdrawal from bond free of tax :

Shipbuilding materials, sec. 7, 2 Supp. R. S., p. 309.

Articles for repair of ships, sec. 8, p. 309.

Manufacturing in bond, sec. 9, p. 309.

Machinery for repair, to be exported, sec. 13, p. 311.

Smelting works as bonded warehouses, sec. 21, p. 312.

All the above provisions, except that in regard to manufacturing in bond, relate also to the collection of revenue from customs, because until final exportation the various articles in bond are liable to duty, and hence must necessarily remain under the control of the Treasury Department for the protection of the revenue.

As to manufacturing in bond, materials subject to customs duty or internal-revenue tax may be used in manufacturing bonded warehouses, but the expense of maintaining that system has always been borne by the manufacturers under express statutory provision, and

this section 9 is no exception to the rule in this respect. There can therefore be no question as to the power of the Secretary to enforce all necessary regulations as to this class.

Class III. Provision as to drawbacks on imported materials. (Sec. 22, 2 Supp. R. S., p. 313.)

1849 Drawbacks have been a feature of the customs system of the United States from the start, and the determination of the amount of drawback to be allowed has from the start been intrusted to officers of the customs service. For this reason, apparently, in the expenditure of the permanent appropriation for the collection of revenue from customs—which dates from 1879 (9 Stats. 378), the expense having previously been met chiefly by a fee system—no distinction has ever been made between expenses incidental to the drawback system and those which concerned the collection of revenue in the strict sense of the term. This long-established practice has prevented any question as to the power of the Secretary to enforce drawback regulations. Moreover, the drawback statutes grant the drawback in express terms, leaving to the officers of the Treasury only such duties as concern the ascertainment of the amount of drawback to be allowed.

Class IV. Provisions as to collection of internal revenue :

Income tax, sec. 34, 2 Supp. R. S., p. 320.

Playing cards, sec. 38, p. 323; sec. 43, p. 324.

Distilled spirits, sec. 49, p. 326; secs. 51, 54, 55, p. 328; sec. 66, p. 331.

Tobacco, sec. 69, p. 332.



The regulations authorized by these provisions all concern the collection of revenue, so that the cost of enforcing them is met by the appropriation for the collection of revenue, and no question as to the power to enforce those regulations can arise. This is true even in the case of the exportation of playing cards, because until actually exported they are subject to tax.

Class V. Miscellaneous provisions.

The recording of trade-marks (sec. 6, 2 Supp. R. S., p. 308) obviously comes within the work of the office of the Secretary of the Treasury, the appropriation for which is not restricted to the collection of revenue.

The prohibition of importation of neat cattle, under sec. 17 (p. 312), and the prohibition of articles made by convict labor, under sec. 24 (p. 314), are matters which, as far as the Treasury Department is concerned with them, are necessarily attended to by the officers employed at the custom-houses along with their other duties. The Department of Agriculture, and not the Treasury, is charged with the inspection of cattle arriving from any foreign country. *Act of August 3, 1890*, §§ 6-10 (26 Stats., 414).

Such neat cattle as are imported are subject to duty, so that regulations in regard to such importation are literally regulations for the "collection of revenue from customs," while even in regard to the exclusion of cattle, hides, and convict-made articles, or the importation of hides, which are on the free list, the enforcement of the Treasury regulations does not require the appointment of any officers for this special purpose, but is merely incidental to general custom-house work.

In every one of the cases cited by claimant's counsel, therefore, no question as to the power to enforce regulations can arise, because the matters to be regulated were all matters for whose efficient regulation the Secretary of the Treasury was invested with adequate power, including the power to employ and pay subordinates. In the case of section 61, on the contrary, no power to employ and pay subordinates for the enforcement of the regulations was either granted by the act itself or existed under any previous law.

NO CONCLUSIVE PRESUMPTION THAT SECTION 61 WAS INTENDED TO BE, FROM THE FIRST, OPERATIVE IN ANY EVENT.

Appellant's counsel (brief, pp. 48, 55) object that the construction put upon section 61 by the court below renders it ineffective, and that "an interpretation is always to be preferred by which an act is to be made effective." While the latter statement is true as a general rule, it does not follow that a court *must* construe every section of a statute so as to make it operative as long as it is on the statute book, no matter what its language may be. In the interpretation of statutes there is no conclusive presumption that they are operative in every part. Inoperative laws are rarely passed, yet it is not wholly unprecedented, even in the case of acts of Congress, for a law to be on the statute book and yet to be wholly inoperative, either from the date of its enactment or from some subsequent time, because of a lack of appropriation to provide the machinery necessary for its execution.

The *Act of March 3, 1871*, section 9 (16 Stats., 514), provided as follows:

That the President of the United States be, and he is hereby, authorized to prescribe such rules and regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose the President is authorized to employ suitable persons to conduct said inquiries, to prescribe their duties, and to establish regulations for the conduct of persons who may receive appointments in the civil service.

Although this section related to a matter of vast importance, and for which Congress now appropriates directly more than \$100,000 a year, not including the item of printing and binding, nothing could be done in regard to it without an appropriation, and hence the *Act of April 20, 1871* (17 Stats., 7), appropriated \$10,000 for the current fiscal year and that of 1871-72, as follows:

To enable the President to carry out the provisions of the act of March third, eighteen hundred and seventy-one, authorizing him to prescribe rules and regulations for the admission of persons into the civil service, and so forth, ten thousand dollars.

For the year 1872-73 the *Act of May 8, 1872* (17 Stats., 83), appropriated as follows:

To enable the President of the United States to perfect and put in force such rules regulating the civil service as may from time to time be adopted by him, twenty-five thousand dollars.

The *Act of March 3, 1873* (17 Stats., 530), reappropriated any unexpended balance of the previous appropriation, but thereafter no further appropriations for this purpose were made, and it is a matter of history that with the cessation of appropriations the civil-service law of 1871, from which so much had been expected in the way of reform, became wholly inoperative, although it remained on the statute book as section 1753, Revised Statutes, so that in so far as it has not been superseded by the *Act of January 16, 1883* (22 Stats., 403, see sec. 7), it is in force to-day, having been brought into operation again by the operation of that act, for which the necessary appropriations have always been made.

Another illustration of a law inoperative for lack of appropriation is furnished by the board of health act of March 3, 1879 (20 Stats., 484). Various appropriations were made for the cost of carrying out this act, down to and including the appropriations of March 3, 1885 (23 Stats., 478, 496), for the fiscal year 1885-86, but thereafter there was no further such appropriation except that of August 4, 1886 (24 Stats., 256, 289), supplying a trifling deficiency for 1885-86. In *Dunwoody v. United States* (143 U. S., 578) this court held that although there was no express statutory limitation of time to the life of the act, the terms of the various appropriation acts "evinced the purpose upon the part of Congress not to create any liability upon the part of the United States, in respect to the work of the National Board of Health, beyond the amounts specifically appropriated by it from time to time for that work," so that no officer or employee of the board had any legal right, by virtue of any implied contract, to

compensation for services rendered after the expiration of the period for which there was an appropriation for such services.

The National Board of Health act remained on the statute book, but simply became inoperative for lack of appropriation, and in the Supplement to the Revised Statutes (p. 261), published five years after the last appropriation had expired, the late Chief Justice of the Court of Claims gave the act in full, except some expired sections, adding the note that "Congress having ceased for several years past to appropriate for the current salaries and expenses of the National Board of Health, it is no longer in active operation, though never expressly abolished."

Another instance of an inoperative law is found in the *Act of March 5, 1888* (25 Stats., 44). This act authorized and directed the Secretary of War to purchase a certain specified piece of ground, with the building thereon, and to cause to be erected thereon another building of a specified character, for the use of the Signal Bureau, the price to be paid for the property, and the cost of the new building, not to exceed certain specified sums. The Attorney-General, on March 22, 1888, gave an opinion that no money could be paid for the purchase of the property, because the act made no appropriation for that purpose. (19 Opins., 131.) The *Act of April 24, 1888* (25 Stats., 90), appropriated the necessary funds, but it is clear that had Congress delayed to appropriate, the first act could not have been carried into effect at all, and that from March 5 to April 24 it was in fact wholly inoperative.

The *Dunwoody* Case, above cited, deciding that where an appropriation is required in order to carry a law into effect, but has not been made, no legal rights can arise from anything done under that law, lays down a doctrine which is precisely applicable to the present case. If anything, the appellant's position was stronger in the *Dunwoody* Case, because the act of March 3, 1879, had been operative for several years before the last appropriation made for its operation had expired, and Dunwoody had been lawfully appointed under it, and had performed services for which he had been paid out of the appropriations. Yet when the last appropriation expired, his rights expired with it, and his status was the same as if no money had ever been appropriated for the purposes of the act, but he had been appointed and had performed services. Had Congress at first made an appropriation for enforcing the Secretary's regulations under section 61, but had failed to renew it at the close of the fiscal year, the appellant would have been in precisely the same situation as Dunwoody; and that Congress never made any such appropriation at any time can not, at all events, give the appellant any greater rights than he would have had in the case supposed.

In the present case it should be remembered that the construction which the court below has put upon section 61 did not make it necessarily inoperative under all circumstances, but only during such time as regulations were not prescribed, or, to look at it practically, during such time as the Secretary of the Treasury was unprovided with funds for enforcing regulations. Had Congress appropriated the money, then the section would

have become operative as soon as the necessary force of men could be secured.

#### APPELLANT NEVER COMPLIED WITH THE STATUTE.

Appellant's counsel insist (Brief, p. 48) that "the right [to rebate] is perfect on claimant's compliance with the statute." Had the appellant so complied, no objection could be made to this statement; but it is submitted that he not only never did so, but that it is uncertain whether he ever would have done so had the opportunity ever been given him. Compliance with the statute meant use of alcohol in compliance with the regulations, and until those regulations were prescribed it was uncertain whether he would find it desirable to comply with them or not. In order to show compliance counsel find it necessary to alter the statute by omitting its vital words. They analyze the section and find that there are five requirements. If such analysis were rightly made, the first requirement would manifestly be this:

1. The manufacturer finding it necessary to use alcohol in the arts may use the same *under regulations to be prescribed*.

Such a requirement, however, conflicts with the argument of appellant's counsel, who proceed to tone down the too-decided language of the statute by omitting the reference to the regulations. A similar toning down is apparently seen in their treatment of the third requirement, which should read:

3. The collector of internal revenue of the proper district is to be satisfied of compliance with the regulations and with the use of the alcohol *therein*, i. e., in the arts under regulations.

The word "therein" is restrictive as to the use of the alcohol, and the restriction may most properly be understood as in regard to the character of the use, but it is precisely this character of the use which appellant's counsel failed to see the importance of. Thinking it unimportant, they consider that the statute may be read as if its language were—

Any manufacturer finding it necessary to use alcohol in the arts may do so, and the Secretary of the Treasury shall prescribe regulations in regard to such use, and the manufacturer, on satisfying the collector, etc.

A sufficient answer to the contention on pages 48 to 51 of the appellant's brief is that it involves a change in the language of the statute.

NO REBATE OF TAXES PAID BEFORE THE ACT OF  
AUGUST 28, 1894, BECAME A LAW IS WARRANTED BY  
SECTION 61.

The present suit is for \$2,344.40 paid as spirits tax before August 28, 1894, as well as for \$4,900.81 paid after that date. It is submitted that even if the former amount had been paid on alcohol which was afterwards used in the arts, etc., under regulations prescribed by the Secretary of the Treasury, no rebate of that amount would have been authorized by section 61. A refund of taxes paid before the passage of the act of August 28, 1894, would involve a retrospective operation of section 61, not warranted by its language or purpose.



The distinction between prospective and retrospective legislation has been well stated, as follows:

As the terms are commonly used in the law, prospective legislation is such as provides rules for facts thereafter to transpire; retrospective, for those which have partly or fully occurred. Prospective interpretation restricts the application of the new law to facts arising after its enactment; retrospective applies it to the past and present facts as well as the future. (Bishop, *Written Laws*, section 83.)

If this distinction be borne in mind, it will be clear that the appellant, in making claim for a refund of taxes paid before August 28, 1894, upon alcohol used by him, seeks to make section 61 operate retrospectively upon alcohol already taxed and upon taxes already paid. Under that section the payment of a tax upon alcohol is a most essential fact, and if such payment took place before August 28, 1894, it was on that day "a past fact"—one which had "fully occurred." That the section should operate only upon alcohol used after that date is not enough to render it fully prospective. To make it operate upon alcohol taxed or taxes paid before that date, would be to make it operate retrospectively—to give to a payment already made an effect which it did not have at the time it was made.

It is a very familiar rule of law that unless the legislature has either explicitly declared by the use of unmistakable words its intention that a statute should operate retrospectively, or unless such intention clearly appears by a necessary implication from the provisions of an act,

no construction which will make an act operate retrospectively can be allowed. (See Black on Interpretation of Laws, p. 250, and cases there cited.) Among the numerous authorities on this subject a few may be selected as especially analogous to the present case.

In *United States v. Heth* (3 Cr., 399) it was held that the words—

there shall, from and after the 30th day of June next, be allowed to collectors, etc., two and a half per centum on all moneys which shall be collected and received by them for and on account of the duties arising on goods, wares, and merchandise imported into the United States—

referred only to importations after June 30, and not to moneys collected after that date on goods imported prior thereto.

A State statute authorizing the registry of deeds proved or acknowledged in other States does not refer to deeds previously so proved or acknowledged, even though registered after the statute was passed. (*McEwen v. Den*, 24 How., 242.)

The *Act of May 6, 1882*, section 4 (20 Stats., 59), requiring a Chinese laborer to produce a certificate as the "only evidence permissible to establish his right of re-entry" into the United States, does not apply to laborers formerly residing in this country who left it prior to the passage of the act, but returned afterwards. (*Chew Heong v. United States*, 112 U. S., 536.)

It is a corollary of the above rule that if the words may be so understood as to make it operate either prospectively or retrospectively, the former operation only

shall be allowed. (*Dyer v. Belfast*, 88 Me., 140; *Gaston v. Merriam*, 33 Minn., 271; *State v. Connell*, 43 N. J. Law, 106; *Lydecker v. Babcock*, 55 id., 394.)

In the present case not only do the words of the section fail to express any intention to allow a refund of taxes paid prior to its enactment, but such retrospective operation would not be in harmony with the purpose of the act as a whole. The word "tax" occurs only twice in the section, where mention is made of "the stamps which show that a tax has been paid thereon," and of "a rebate or repayment of the tax so paid." What tax is here referred to? Evidently, the only tax on alcohol referred to in the rest of the act, viz, the tax imposed by the act, at the rate of \$1.10 per proof gallon, in section 48, and referred to in the thirteen sections preceding and the seven sections following this section 61. Had Congress intended to refer to any other tax than that levied by this act it would certainly have done so, and it could very easily have done so by merely adding words to express an intention to grant a rebate of taxes already paid. It has not done so, and to read such words into the section would be the extreme of judicial legislation.

It is no answer to this to contend, as was done in the court below, that there is a contract "between the Government and the manufacturer who uses the alcohol," that "the promise is that if he uses the alcohol in the arts he shall receive a rebate of the tax." The question is, What tax is to be repaid? And the answer must be, The tax imposed by the act, and not some other tax, imposed by some other act.

Moreover, the act was a revenue measure, designed to readjust the burdens of taxation, to impose certain taxes, to remove certain other taxes previously imposed, and to define the sources from which and the rates at which money should thereafter be collected for the use of the Government. It had nothing to do with the disposition to be made of money already in the Treasury. Congress decided that in future alcohol should be taxed at \$1.10 per proof gallon, but that when it was used in the arts or in any medicinal or other like compound, under certain regulations, the tax paid thereon should be refunded. The object of the refund was practically to relieve from taxation the alcohol so used.

To have provided for a rebate on alcohol already taxed would have been to go outside the sphere of a revenue act in order to provide for the expenditure of public funds already in hand, and even, it would seem, to do so by way of a gratuity. This would have been wholly inconsistent with the plain purpose of the act itself. To assume that Congress so intended is to assume that it intended to single out of the prior tax law one feature which it considered undesirable, and to refund the tax to the parties affected thereby, after that law had ceased to operate, but as long as the material already taxed by it remained unused, without undertaking, however, to correct the results of any other feature of such prior law. Such an assumption is impossible. There was no more reason to refund the alcohol tax to manufacturers than to refund the taxes on wool, lumber, paintings, statuary, or any other articles placed on the free list, to the users of those articles.

To make the operation of section 61 wholly prospective, as Congress clearly intended to do, inflicted no hardship on the manufacturers. They were promised, upon certain conditions, a rebate of the internal-revenue tax levied upon alcohol by this act. This promise did not extend to alcohol taxed under the law previously in force, any more than to foreign alcohol upon which an import duty had been paid. If for a time the appellant failed to procure the alcohol to which the promise extended, he can not ask for judicial legislation to help him out. It was contended in the court below that it would be "an absurd consequence" of section 61 if the buyer of alcohol taxed before August 28, 1894, could obtain no rebate of the tax, although had he bought alcohol taxed after that date he could have had a rebate. This is no more "absurd" than the undeniable fact that the act of 1894 legislated money directly into the pockets of distillers, because the previously taxed alcohol brought the same price after the new tax rate had been established as if it had been taxed at that rate. The law which has not some consequences that someone might call absurd has probably not yet been enacted.

The opinion of the Solicitor-General in the copyright case (21 Op. Atty. Gen., 159), cited in the court below, is not in conflict with what has been stated above. The Solicitor-General held that the owner of a copyright of a book "copyrighted in accordance with the requirements of" the act of March 3, 1891, though before its passage, was entitled to the benefit of that act. Had the first 30 barrels of alcohol involved in the present case been taxed "in accordance with the requirements

of" the act of August 28, 1894, including the rate required by that act, then undoubtedly the claimant would have been as much entitled to the benefits of that act upon those barrels as upon the balance. The fact that it would have been impossible, before the passage of a law, for an article to be taxed at a rate which was first established by that law, shows the difference between this case and that which was before the Solicitor-General. That opinion concerned copyrights obtained by citizens of the United States whose books were printed from type set within the United States, or from plates made therefrom, conditions which could exist just as well before the passage of the act of March 3, 1891, as afterwards. In such cases the requirements of that act had been complied with as well as those of the law previously in force. Under the previous law, however, persons not citizens of the United States could not obtain copyrights at all, and hence could not comply with the requirements of the act of March 3, 1891, before its passage, so that the opinion had no reference to them. Alcohol taxed before August 28, 1894, could no more be taxed "in accordance with the requirements of" the act of that date than foreigners could, before March 3, 1891, obtain copyrights "in accordance with the requirements of" the act of that date. Hence, in the present case, the analogy is with the latter class of persons, and not with those referred to in the opinion.

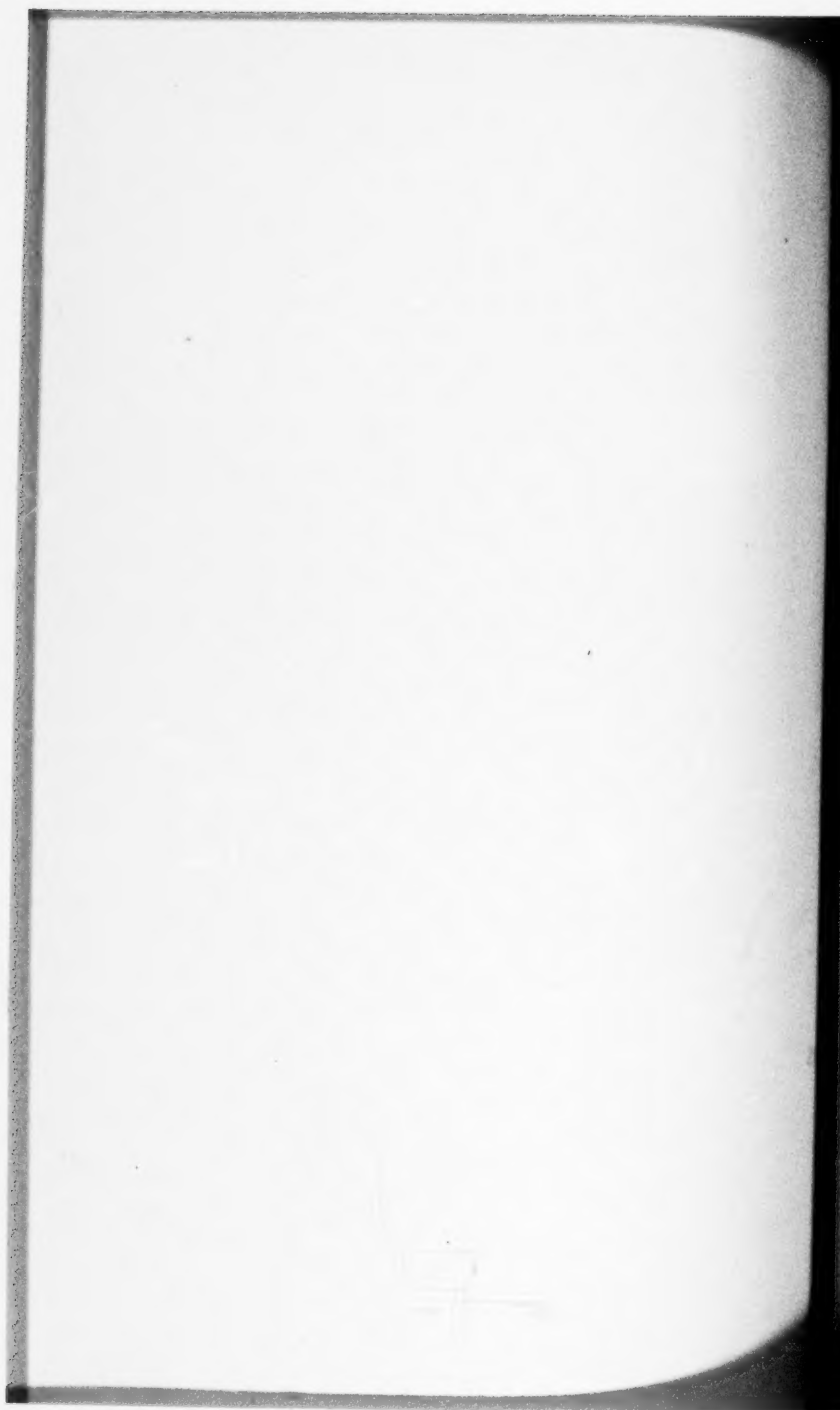
The attempt to extend the operation of section 61 of the act of August 28, 1894, to alcohol taxed under the law previously in force is, of course, a minor feature of

the present case, but it serves well to illustrate the extraordinary theory of statutory construction upon which this claim is based. When once the sound and well-recognized rules of construction are departed from, and a rebate is claimed under conditions excluded by the plain language of the section, it is but going one step farther to claim that the section was retrospective, though containing not one word to warrant such a construction.

It is submitted that the judgment of the court below should be affirmed.

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JOHN W. GRIGGS,  
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No. 218.

Sup: Dy. of City  
Singer) for U. S.



Filed Nov. 29, 1898.

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**In the Supreme Court of the United States.**

GRANTED TERM, 1898.

ROBERT DUNLAP, APPELLANT,

v.

THE UNITED STATES.

} No. 313.

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**APPEAL FROM THE COURT OF CLAIMS.**

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**SUPPLEMENTAL BRIEF FOR THE UNITED STATES.**

CHARLES C. BINNEY,  
Special Attorney.

JOHN W. GRIGGS,  
Attorney-General.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1898.

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ROBERT DUNLAP, APPELLANT,	} No. 218.
<i>v.</i>	
THE UNITED STATES.	

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## APPEAL FROM THE COURT OF CLAIMS.

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### SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

Since the filing of the brief for the United States the counsel for appellant have presented a brief in reply, discussing certain features of the case. Much of this matter is sufficiently discussed in the brief for the United States, but some points seem to require a short statement in elaboration of the position of the United States.

#### 1.

*When the right to manufacture under section 61 began.*

Appellant's counsel (reply brief, pp. 2-4) fail to realize the difference between the taking effect of the act of August 28, 1894, and the coming into existence of the

right to manufacture under section 61 of that act. Undoubtedly the act went into effect on the day when the time allowed by the Constitution for the President's action upon it expired, viz, August 28, 1894, and on that day it became the duty of the Secretary of the Treasury to take whatever steps lay in his power to arrange for carrying into operation the provisions of section 61 at the earliest possible date; but it does not at all follow that every manufacturer who used alcohol on that day and preserved his stamps was entitled to a rebate. Appellant's counsel, however, insist that every manufacturer was so entitled, and they are necessarily driven to that position in spite of its manifest unreasonableness. The brief for the United States (p. 11) offered them the choice of either horn of the dilemma—a right to rebate for all alcohol used in the arts, etc., from the moment the act became a law, or a right depending upon a use under regulations; and they are compelled to choose the former.

Their position, then, is that although the act took effect on August 28, 1894, and provided for regulations *to be* prescribed, and although it would have been clearly impossible to prescribe any effective regulations for some time thereafter, the use of alcohol in manufacturing on that day involved the right to rebate; or in other words, that Congress *intended* that for a certain period of time the unregulated use of alcohol in the arts, etc., should entitle the manufacturer to a rebate.

They seek, indeed, to make their position less glaringly unreasonable by saying that during the ten days that the President held the bill "the Treasury Department had an opportunity to prepare for putting all its provisions

into effect." Were the United States no larger than the Republic of San Marino, perhaps ten days would have sufficed, but the question is not whether ten days were enough, but what Congress intended by the words "under regulations *to be* prescribed." Congress did not intend that ten days should elapse after it passed the bill before it became a law, for that was a matter about which it could have no intention, one way or the other, the Constitution having left the matter wholly to the President. If the President had signed the bill the day of its passage, there would have been no interval of ten days, yet the language and the meaning of section 61 would have been the same, viz, as appellant's counsel contend, that an immediate right to rebate was granted for all use of alcohol in manufactures, even though a use "under regulations" would be impossible for some time, provided only the stamps were preserved and the collector was satisfied that the alcohol was used.

It seems superfluous to add that until the act became a law it was not the Secretary's duty to obey it, and that the act could not possibly have intended that the regulations were to be prescribed, or anything done in regard to them, until the act itself took effect.

## 2.

### *The possibility of unreasonable regulations.*

Appellant's reply brief contends (pp. 4-6) that if the Secretary, though ostensibly undertaking to carry out section 61, had attempted to unduly restrict its scope and to exclude from its benefits persons who were really

entitled thereto, such persons would have been without remedy unless the section be so construed as to allow of a rebate for alcohol not used under regulations. It is assumed that the restrictive definition of "manufacturer" in the proposed regulations (Rec. 10) would have been finally adopted and would have excluded the appellant. This latter it certainly would not have done, he being a *manufacturer* for wholesale only, within any standard definition of the word "wholesale" (though it is true the record is silent as to this, the definition not having been adopted); but even if anyone had been improperly excluded by an unreasonable interpretation of the word "manufacturer," he would not have been without a remedy. While the framing of the necessary regulations may not have been a ministerial act, their execution would undoubtedly have been ministerial, and hence the acceptance of the bond, inspection of the premises, grant of a license, and assignment of an officer, if provided for by the regulations, could all have been compelled by mandamus, and any manufacturer unjustly discriminated against by the Secretary of the Treasury or the Commissioner of Internal Revenue would have had a right of action against those officers for the damages caused by their official nonfeasance or misfeasance, mistake or honesty of intention being no defense. (*Amy v. Supervisors*, 11 Wall., 136; *Mecham on Public Officers*, § 664.) When the law makes public officers personally liable for their official acts, and also provides for their impeachment, the rights of the citizen are sufficiently protected against official oppression. No government guarantees its citizens against loss by official

misconduct, and the bare possibility of loss from such misconduct is not a reason for interpreting a statute in defiance of the plain meaning of its words.

## 3.

*The authority of United States v. McLean.*

Appellant's brief in reply (p. 7) refers to *McLean v. Vilas* (124 U. S., 86) as "overruling the position taken in the original *McLean case*," i. e. *United States v. McLean* (95 U. S., 750). As stated in the brief for the United States (p. 13), the decision in *McLean v. Vilas* was merely to the effect that the suggestion of the court in *United States v. McLean*, that "if the executive officer failed to do his duty, he might have been constrained by a *mandamus*," did not apply in that particular case, no failure of duty being shown. The doctrine of *United States v. McLean* was not "departed from," but remained unshaken, was followed in *United States v. Verdier* (164 U. S., 213), and is clearly applicable to the present case. That this doctrine was announced "with apparent regret" may be true, but the court did not allow the hardness of the case to impair the law.

## 4.

*The British practice as to methylation.*

Appellant's brief in reply (p. 11) adverts to British experience under 43 and 44 Vict., c. 24, which is stated to be "similar" to section 61. The British system differs *in toto* from that contemplated by section 61. Under the former alcohol is withdrawn free of tax, methylated under supervision, in large quantities at a time, and then sold

for any purpose whatever, provided it be not afterwards subjected to demethylation, the practicability of which is disputed. Obviously the number of methylators is very small as compared with the users of methylated spirits, even in manufacturing, and the industrial use of methylated spirits is much more restricted than that of pure alcohol; hence it is not surprising that the supervision of occasional methylation is a comparatively small affair. Section 61 provides for the use of pure alcohol, not methylated spirits, and its use by manufacturers, not by methylators. It does not permit a rebate in the case of methylation by one man and the purchase of the methylated spirits by another man for use in manufacturing. If the regulations had required methylation where feasible, each manufacturer would have had to do this for himself, so that practically the same amount of supervision would have been required as where the alcohol was used pure. In the one case the methylation would have been supervised, and in the other the manufacturing operations.

The experience in a compact country like Great Britain, under a law of limited application, is obviously no criterion for what would be involved in applying the very broad provisions of section 61 throughout the length and breadth of the United States.

##### 5.

*Section 61 required precautions before and during the use of the alcohol.*

The reply brief contends (pp. 12-14) that supervision of the use of alcohol under section 61 could not have

been intended, because the necessity of satisfying the collector, as to the use of the alcohol, would have proved a sufficient protection against fraud. Had Congress so thought, it would have been easy to simply provide that any manufacturer who satisfied the collector that he had used alcohol in the arts or in any medicinal or other like compound, should receive the rebate. Such a provision would have avoided all trouble, provided it was practicable, which it certainly would not have been. To supervise the actual use of alcohol by manufacturers throughout the United States would have required the constant employment of a number of men, but to receive, from private and interested parties, convincing evidence of the same use, after it had taken place, would probably have required a greater number of days' work on the part of collectors and deputy collectors, whose numbers could not be increased without authority from Congress. As a general rule, the quickest way to know that a thing is done is to see it done; to receive proof of it afterwards takes much longer.

In point of fact, section 61 provides that the collector is to be satisfied of two things, viz, compliance with regulations and use of alcohol. Were he not required to be satisfied that the regulations had been complied with, it might be argued that the use of the alcohol was really all that need be proved in any event, but the fact that he is to be satisfied of compliance with the regulations shows that the mere use is not all. The language of the statute shows that the use of the alcohol is one thing, and the compliance with the regulations another, the latter being, in fact, the *proper* use of the alcohol, i. e., its use under such



circumstances as insure that the claim for rebate is a proper one, or, in other words, that no portion of the alcohol has been or can be used for any other purpose than those contemplated by the section, or has been or can be the subject of any other claim for rebate. The provision that the collector was to be satisfied that the alcohol had been used seems to relate to proof of the amount of alcohol for which claim is made, a comparatively simple matter; but the provision that he was to be satisfied that the regulations had been complied with relates to the character of every detail of the use of the alcohol, a much more difficult matter to ascertain with certainty, unless from contemporaneous and disinterested sources, i. e., from the reports of persons charged with official supervision. Apparently, in providing that collectors were to be satisfied that the regulations had been complied with, Congress intended that they should pass upon the reports of the officers who supervised the use of the alcohol, for, in view of the manifold duties of collectors, more than this could not possibly have been contemplated.

#### 6.

#### *No analogy to the drawback system.*

Appellant's counsel (Brief in reply, pp. 14-17) again advert to the system of drawbacks on alcohol on exportation, and the ease with which the system is operated. Drawbacks are allowed on *the alcohol in a manufactured article* when exported, a comparatively easy matter to ascertain. The amount of alcohol used in the manufacture of the same article would be much more difficult of proof, and it would be still more difficult to ascertain the

amount used, when none of it remained in the manufactured article. The court has ascertained that, in the present case, from the evidence presented, but at a considerable expenditure of its own time, as well as of that of counsel and witnesses. It was to simplify the evidence of the use, as well as to secure the United States against fraud, that Congress required a use "under regulations."

## 7.

*The statutes against fraud.*

Appellant's brief, in reply (pp. 17-19), calls attention to the numerous penal statutes in regard to evasions of the spirits tax, and concludes with the statement that "attempts to commit fraud under section 61 could not have escaped one or more of these penalties."

It is very probable that if section 61 had been put into operation, some attempts to obtain rebate without a *bona fide* use of the alcohol would have been detected and punished; but if it is meant to be contended that the penal laws in regard to the spirits tax would have effectually taken the place of direct supervision of the use of the alcohol in the arts, etc., so as to prevent payments of rebate in any case where the alcohol had not been properly used, or could afterwards have been recovered and put to other uses, the contention is utterly without foundation. The inducement to make money by obtaining a rebate for more alcohol than had actually been used in manufacturing, or by recovering the alcohol and using it for other purposes after the rebate had been paid, would have been precisely as strong as the inducement to avoid payment of the tax in

the first instance, and what that is at the present day, in spite of all the precautions taken by the Bureau of Internal Revenue, may be gathered from the Commissioner's Report for 1897 (pp. 22-25). It appears that in the year 1896-97, 95 registered distilleries were reported for seizure on account of fraudulent practices, 2,273 illicit stills were seized, 829 persons arrested, one revenue officer killed and three wounded, and that the number of stills seized in the nine preceding years had been as follows: In 1888, 518; 1889, 466; 1890, 583; 1891, 795; 1892, 852; 1893, 806; 1894, 1,016; 1895, 1,874; 1896, 1,905.

It is undoubtedly true that most of these illicit stills were in the wilder portions of the Southern States, yet 1 is reported from the first New Jersey district, 1 from New Hampshire, 6 from the districts of New York, and 1 from Ohio. Moreover, the Commissioner reported, "the seizure of illicit stills within the last few years has greatly increased. This matter should receive serious consideration." And his statement was certainly justified, as the seizure of 1,905 stills in 1896 did not prevent the existence of 2,273 illicit stills to be discovered and seized in 1897. How many attempts to defraud the revenue were successful and are not reported is conjectural, but manifestly the success of the revenue agents in discovering evasions of the law is very far from being complete.

While the fact that claims under section 61 would have had to be based on manufacturing operations would have tended to prevent frauds from being carried on under the same geographic conditions which existed in

those parts of the country where most of the illicit distilling takes place, yet the extent to which fraudulent evasions of the spirits tax are committed measures in some degree the force of the temptation; and that the temptation would be any weaker under section 61, so as to allow a relaxation of the vigilance of the revenue officers in regard to the use of alcohol in manufactures, can not be asserted with any confidence. In any event, Congress having contemplated the granting of a rebate for alcohol used in manufacturing under regulations, it can not be supposed that Congress intended to trust to the enforcement of penal laws after the manufacturing had been done, instead of to regulation during the actual process of manufacture.

## 8.

*History of section 61.*

The reply brief (p. 26) points out that the House of Representatives only raised the spirits tax to \$1 a gallon, not to \$1.10. This fact, however, does not indicate any greater concern for the interests of manufacturers than for those of other users of alcohol. The House did raise the tax from 90 cents to \$1, and as the rebate system was not one of the reductions of taxation which the House proposed, it can not have been regarded by that body as within "the general purposes of the act of 1894." (See Appt.'s Brief, p. 4.) The further statement that "the rate of \$1.10 was throughout coupled with the remission of tax on alcohol used in the arts" is misleading. It is true that when the Senate passed the bill both changes had been made, but the change in rate was

made first by the Committee on Finance, and without any reference to the rebate amendment, which was offered in Committee of the Whole, by a member of the minority, three months after the Committee on Finance had reported the bill, and entirely independently of the action of that committee. (See 26 Cong. Rec., 3126, 6936, 6956.)

## 9.

*The general power of the Secretary as to regulations.*

It is contended (Brief in reply, p. 27) that the Secretary of the Treasury could have made all necessary regulations for a rebate system by virtue of the general power vested in him by Revised Statutes, § 251, and that therefore the requirement of regulations in section 61 was practically unnecessary. Assuming the correctness of the premises, they certainly do not warrant the conclusion. If there could have been regulations without any reference to them in section 61, the grant of a right to rebate could not possibly have been made subject to compliance with, or previous existence of, regulations; but the fact that that section required the use of the alcohol to be "under regulations to be prescribed" shows a very positive intention not to grant the rebate with or without regulations, but to insure their existence before the right to rebate could exist.

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*Special Attorney.*

JOHN W. GRIGGS,  
*Attorney-General.*

## DUNLAP *v.* UNITED STATES.

### APPEAL FROM THE COURT OF CLAIMS.

No. 218. Argued November 29, 30, 1898. — Decided February 20, 1899.

The act of August 28, 1894, c. 349, does not grant a right *in præsentis* to all persons who may, after the passage of the law, use alcohol in the arts, or in any medicinal or other like compounds, to a rebate or repayment of the tax paid on such alcohol, but the grant was conditioned on use, in compliance with regulations to be prescribed, in the absence of which regulations the right did not so vest as to create a cause of action by reason of the unregulated use.

DUNLAP was, and had been for many years, "engaged in the manufacture of a product of the arts known and described as 'stiff hats,'" in Brooklyn, New York. Between August 28, 1894, and April 24, 1895, he used 7060.95 proof gallons of domestic alcohol to dissolve the shellac required to stiffen hats made at his factory. An internal revenue tax of ninety cents per proof gallon had been paid upon 2604.17 gallons before August 28, 1894, making \$2344.40, and a tax of one dollar and ten cents per proof gallon had been paid upon the remaining 4456.78 gallons after August 28, 1894, making \$4900.81, or \$7245.21 in all. In October, 1894, Dunlap notified the Collector of Internal Revenue of the First District of New York that he was using domestic alcohol at his factory, and that under section 61 of the act of August 28, 1894, c. 349, 28 Stat. 509, 567, he claimed a rebate of the internal revenue

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tax paid on said alcohol, and he requested the collector to take such official action relative to inspection and surveillance as the law and regulations might require. Subsequently he tendered to the collector affidavits and other evidence tending to show that he had used the aforesaid quantity of alcohol in his business, together with stamps showing payment of tax thereon, and he requested the collector to visit the factory and satisfy himself by an examination of the books or in any other manner, that the alcohol had been used as alleged. He also requested payment of the amount of tax appearing from the stamps to have been paid. The collector declined to entertain the application, and Dunlap filed a petition in the Court of Claims to recover the full amount of the tax which had been paid, as shown by the stamps, which, on December 6, 1897, was dismissed, whereupon he took this appeal.

The findings of fact set forth, among other things, that "in the early part of September, 1894, the Secretary of the Treasury requested the Commissioner of Internal Revenue to have regulations drafted for the use of alcohol in the arts, etc., and for the presentation of claims for rebate of the tax;" and that "subsequently there was correspondence between these officers as follows:"

From the Commissioner to the Secretary, October 3, 1894:

"I have the honor to report that the preparation of regulations governing the use of alcohol in the arts and manufactures, with rebate of the internal revenue tax as provided by section 61 of the revenue act of August 28, 1894, has been and is now receiving very serious consideration from this office, and many communications have been received from, and personal interviews had with, manufacturers who use alcohol in their establishments; and it is found, in every case without exception, all agree that no regulation can be enforced without official supervision, and that without such supervision the interests of manufacturers and of the Government alike will suffer through the perpetration of frauds.

"As it is found to be impossible to prepare these regulations in a way that will prove satisfactory without official supervision, I have the honor to inquire whether there is any

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appropriation or any general provision of law authorizing the expenditure of money by this Department needed to procure such supervision."

From the Secretary to the Commissioner, October 5, 1894:

"Yours of the 3d instant, inquiring whether there is any appropriation or general provision of law authorizing the expenditure of money by the Treasury Department or by the Commissioner of the Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, is received, and in response I have the honor to state that no appropriation whatever, either special or general, has been made by Congress for the purpose mentioned, or for any other purpose connected with the execution of the section of the statute referred to."

From the Commissioner to the Secretary, October 5, 1894:

"I have the honor to acknowledge the receipt of your letter of the 5th instant, in reply to my letter of the 3d instant, in which you state that no appropriation whatever, either special or general, has been made by Congress authorizing the expenditure of money by the Treasury Department or by the Commissioner of Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, or for any purpose connected with the execution of the section of the statute referred to.

"In reply I would suggest that, inasmuch as I have been unable, as stated in my letter of the 3d instant, after thorough consideration of the matter, and upon consultation by letter and by personal interview with a large number of the most prominent manufacturers, to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress, the preparation of these regulations be delayed until Congress has opportunity to supply this omission."

From the Secretary to the Commissioner, October 6, 1894:

"Your communication of yesterday, in reference to the execution of section 61 of the act of August 28, 1894, and



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advising me that, for the reasons therein stated, you are unable 'to prepare any set of regulations which would yield adequate protection to the Government and the honest manufacturer without official supervision, which has not been provided for by Congress,' is received. I have also given much attention to the subject, and have fully considered all the arguments and suggestions submitted by parties interested in the execution of the section of the statute referred to, and have arrived at the conclusion that, until further action is taken by Congress, it is not possible to establish and enforce such regulations as are absolutely necessary for an effective and beneficial execution of the law.

"You are, therefore, instructed to take no further action in the matter for the present."

In consequence of this last letter a circular was issued by the Commissioner, November 24, 1894, stating:

"In view of the fact that this Department has been unable to formulate effective regulations for carrying out the provisions of section 61 of the act of August 28, 1894, relating to the rebate of tax on alcohol used in the 'arts, or in any medicinal or other like compounds,' collectors of internal revenue will, on receiving notice from manufacturers of the intended use of alcohol for the purposes named, advise such manufacturers that, in the absence of regulations on the subject, no official inspection of the alcohol so used or the articles manufactured therefrom can be made, and that no application for such rebate can be allowed or entertained."

Finding VIII was:

"On December 3, 1894, the Secretary of the Treasury transmitted to the Congress the annual report on the finances, containing the following statement:

"Owing to defects in the legislation the Treasury Department has been unable to execute the provisions of section sixty-one of the act of August 28, 1894, permitting the use of alcohol in the arts, or in any medicinal or other like compound, without the payment of the internal tax. The act made no appropriation to defray the expenses of its administration, or for the payment of taxes provided for; and, after

## Counsel for Parties.

full consideration of the subject and an unsuccessful attempt to frame regulations which would, without official supervision, protect the Government and the manufacturers, the Department was constrained to abandon the effort and await the further action of Congress.

“It is estimated in the office of the Commissioner of Internal Revenue that the drawbacks or repayments provided for in the act will amount to not less than \$10,000,000 per annum, and that the expense of the necessary official supervision will not be less than \$500,000 per annum. For the information of Congress, the correspondence between the Secretary and the Commissioner of Internal Revenue upon this subject will accompany this report. Finance report, 1894, LXVI.’

“Appended to this report was a draft of regulations proposed for carrying out section 61, copies of communications from the Commissioner of Internal Revenue explaining the estimates of the appropriations required, and copies of the official correspondence between the Secretary and the Commissioner, given in the preceding finding, showing the action of the Department. The proposed regulations were as follows:”

[These regulations, consisting of thirty-three articles and including many subdivisions, were set forth at length.]

The ninth finding was to the effect that the amounts appropriated in the urgent deficiency act of January 25, 1895, 28 Stat. 636, c. 43, aggregating \$245,095, were the amounts of the Secretary's estimate transmitted to Congress December 4, 1894, as necessitated by the income tax provisions of the act of August 28, 1894.

The case is reported 33 C. Cl. 135.

*Mr. George A. King* and *Mr. Joseph H. Choate* for appellant. *Mr. B. F. Tracy* and *Mr. William B. King* were on their brief.

*Mr. Charles C. Binney* and *Mr. Attorney General* for appellees.

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MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

Section 61 of the act of August 28, 1894, reads as follows:

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

The Court of Claims held that as the rebate provided for was to be paid only on alcohol used "under regulations to be prescribed by the Secretary of the Treasury;" and as this alcohol had not been so used, there could be no recovery; and, speaking through Weldon, J., among other things, said:

"The right of the manufacturer to a rebate being dependent on the regulations of the Secretary, such regulations are conditions precedent to his right of repayment, and therefore no right of repayment can vest until in pursuance of regulations the manufacturer uses alcohol as contemplated by the statute. The statute having prescribed certain conditions upon which the right of the claimant is predicated, and from which it originates, there can be no cause of action unless it affirmatively appears that such conditions have been complied with on the part of the claimant. This is a proceeding based upon an alleged condition of liability upon the part of the defendants, and it must be shown that all the essential elements of that condition exist before any liability can accrue. Conceding that it was the duty of the Secretary to prescribe regulations consistent with the purpose and requirements of the law, his failure to do so will not supply a necessary element in the cause of the claimant."

Alcohol had for years been used in the arts and in medicinal and other like compounds, and had been taxed and

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no rebate allowed, but by this section, manufacturers who used alcohol in the arts, etc., under regulations prescribed by the Secretary, were granted a rebate on proof of such regulated use and of the payment of the tax on the alcohol so used.

There were no regulations in respect to the use of alcohol in the arts at the time this alcohol was used, but it is contended that the right to repayment was absolutely vested by the statute, dependent on the mere fact of actual use in the arts, and not on use in compliance with regulations. So that during such period of time as might be required for the framing of regulations, or as might elapse, if additional legislation were found necessary, all alcohol used in the arts would be free from taxation, although the exemption applied only to regulated use. But if the right of the manufacturer could not enure without regulations, and Congress had left it to the Secretary to determine whether any which he could prescribe and enforce would adequately protect the revenue and the manufacturers, and he had concluded to the contrary; or, if he had found that it was not practicable to enforce such as he believed necessary, without further legislation, then it is obvious the right to the rebate would not attach; in any view the right was not absolute but was conditioned on the performance of an executive act, and the absence of performance left the condition of the existence of the right unfulfilled.

The distinction between the one class of cases and the other is clear, and has been observed in many decisions of this court.

By the eighth section of the act of June 12, 1866, c. 114, 14 Stat. 60, it was provided, "that when the quarterly returns of any postmaster of the third, fourth or fifth class show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of eighteen hundred and fifty-four, fixing compensation, then the Postmaster General shall review and readjust under the provisions of said section," (namely, § 2, act of July 1, 1864, c. 197, 13 Stat. 335, 336;) and in *United States v. McLean*, 95 U. S. 750, it was held that the law imposed no obligation on the Government to pay an increased salary, though warranted by the quarterly

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returns of an office, until readjustment by the Postmaster General. Mr. Justice Strong, delivering the opinion, after remarking that the "readjustment was an executive act, made necessary by the law in order to perfect any liability of the Government," said:

"But courts cannot perform executive duties, nor treat them as performed when they have been neglected. They cannot enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled." And see *United States v. Verdier*, 164 U. S. 213.

On the other hand, in *Campbell v. United States*, 107 U. S. 407, it was ruled that where a statute declares that there shall be a rebate or drawback of a tax under certain circumstances, the amount to be determined under regulations prescribed by the Secretary of the Treasury, the inaction of the Secretary is immaterial, and the drawback must be paid whether ascertained under the Secretary's regulations or not, because the right to the drawback depends on the statute, and not on the Secretary's regulations, which relate merely to the ascertainment of the amount. The difference between the statutes in regard to drawbacks, and the wording of section 61, is very marked. Drawback laws relate to an article after it is manufactured. The mere use of imported materials in manufacturing does not entitle the manufacturer to a drawback, and it is only when the manufactured goods are exported that the reason for the repayment of duty arises. In such instances the exportation and the ascertainment of the character and quality of the imported materials existing in the manufactured article are subjected to regulation, but not the process of manufacture. The case of *Campbell* only concerned the ascertainment of the amount of drawback, and it was held that inasmuch as the amount had been proved to the satisfaction of the court as completely as if every reasonable regulation had been complied with, a recovery could be sustained.

If we compare section 61 with the statute involved in *Campbell v. United States*, (act of August 5, 1861, 12 Stat.

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292, c. 45, § 4,) the distinction between this case and that will be clearly discernible.

§ 61, act of August 28, 1894.

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasurer of the United States a rebate or repayment of the tax so paid."

§ 4, act of August 5, 1861.

"From and after the passage of this act, there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback, equal in amount to the duty paid on such materials and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury; *Provided*, that ten per centum on the amount of all drawbacks, so allowed, shall be retained for the use of the United States by the collectors paying such drawbacks respectively."

By the act of 1894 Congress required that the thing itself should be done under official regulations; by the act of 1861, simply that proof of the doing of the act should be made in the manner prescribed.

In the case before us the first condition was that the alcohol should have been used by the manufacturer in accordance with regulations; and as that condition was not fulfilled, it is difficult to hold that any justiciable right by action in *assumpsit* arose.

This is the result of the section taken in its literal meaning, and as the rebate constituted in effect an exemption from taxation, we perceive no ground which would justify a departure from the plain words employed.

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Nor are we able to see that the letter of the statute did not fully disclose the intent.

This section was one of many relating to the taxation of distilled spirits, which imposed a higher tax and introduced certain new requirements in regard to regauging, general bonded warehouses, etc., the object to derive more revenue from spirits used as beverages being perfectly clear; and the general intention to forego the revenue that had been previously derived from spirits used in the arts could only be carried out in consistency with the general tenor of the whole body of laws regulating the tax on distilled spirits, which undertook to guard the revenue at all points, and which required from the officers of the Government evidence that everything had been correctly done. The regulations contemplated by section 61 were regulations to insure the *bona fide* use in the arts, etc., of all alcohol on which a rebate was to be paid and to prevent such payment on alcohol not so used; and these were to be specific regulations under that section, and could not otherwise be framed than in the exercise of a large discretion based on years of experience in the Treasury Department.

Since, as counsel for Government argue, the peculiar nature of alcohol itself, the materials capable of being distilled being plentiful, the process of distillation easy, and the profit, if the tax were evaded, necessarily great, had led in the course of thirty years to a minute and stringent system of laws, aimed at protecting the Government in every particular, it seems clear that when Congress undertook to provide for refunding the tax on alcohol when used in the arts, it manifestly regarded adequate regulations to prevent loss through fraudulent claims as absolutely an essential prerequisite; and may reasonably be held to have left it to the Secretary to determine whether or not such regulations could be framed, and if so, whether further legislation would be required. It is true that the right to the rebate was derived from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations if he found it practicable to do so.



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Without questioning the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body, *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 318, it is nevertheless interesting to note that efforts were made in the Senate to amend the bill by the addition of sections which, while making alcohol used in the arts free from the tax, sought to secure the Government from fraud by provisions for the methylating of such spirits so as to render them unfit for use as a beverage; that these proposed amendments were rejected, 26 Cong. Rec. 6935, 6936; and that subsequently section 61 was adopted as an amendment, it being urged in its support that "if the Secretary of the Treasury and the Commissioner of Internal Revenue think they cannot adopt any regulations which will prevent fraud, then nothing will be done under it; but if they conclude they can adopt such regulations as will prevent fraud in the use of alcohol in the manufactures and the arts, then there will be relief under it." 26 Cong. Rec. p. 6985.

As soon as the act of August 28, 1894, became a law, without the approval of the President, Congress adjourned, and at its first meeting thereafter the Secretary reported a draft of the regulations he desired to prescribe, stating that their enforcement would cost at least half a million of dollars annually, for which no appropriation was available, and that therefore he could not execute the section until Congress took further action, and he transmitted the correspondence between himself and the Commissioner, including his letter of October 6, 1894, instructing the Commissioner to take no action regarding the matter.

Congress was thus distinctly informed that no claims for rebate would be entertained in the absence of further legislation, but none such was had, and finally, on June 3, 1896, section 61 was repealed, and the appointment of a joint select committee was authorized to "consider all questions relating to the use of alcohol in the manufactures and arts free of tax, and to report their conclusions to Congress on the first Monday in December, eighteen hundred and ninety-six," with



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power to "summon witnesses, administer oaths, print testimony or other information." 29 Stat. 195, c. 310.

Numerous other provisions of the act called for regulations by the Secretary of the Treasury, such as those relating to the collection of customs duties and the free list; to the importation or manufacture in bond or withdrawal from bond free of tax; to drawbacks on imported merchandise; to the collection of internal revenue, and some others; but these related to matters for whose efficient regulation the Secretary of the Treasury was invested with adequate power, and their subject-matter was different from that of section 61.

If the duty of the Secretary to prescribe regulations was merely ministerial, and a mandamus could, under circumstances, have issued to compel him to discharge it, would not the judgment at which he arrived, the action which he took, and his reference of the matter to Congress, have furnished a complete defence? But it is insisted that by reason of the exercise of discretionary power necessarily involved in prescribing regulations as contemplated, the Secretary could not have been thus compelled to act. We think the argument entitled to great weight, and that it demonstrates the intention of Congress to leave the entire matter to the Treasury Department to ascertain what would be needed in order to carry the section into effect. Nothing could have been further from the mind of Congress than that repayment must be made on the unregulated use of alcohol in the arts, if in the judgment of the Department, as the matter stood, such use could not be regulated.

All this, however, only tends to sustain the conclusion of the Court of Claims that this was not the case of a right granted *in presenti* to all persons who might, after the passage of the law, actually use alcohol in the arts, or in any medicinal or other like compounds, to a rebate or repayment of the tax paid on such alcohol, but that the grant of the right was conditioned on use in compliance with regulations to be prescribed, in the absence of which the right could not vest so as to create a cause of action by reason of the unregulated use. The decisions bearing on the subject are examined and

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discussed in the opinion of the Court of Claims, and we do not feel called on to recapitulate them here.

*Judgment affirmed.*

MR. JUSTICE BROWN, MR. JUSTICE WHITE, MR. JUSTICE PECKHAM and MR. JUSTICE MCKENNA dissented.